(29)

No. 93-518

In the Supreme Court of the United States

OCTOBER TERM, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certiorari To
The Oregon Supreme Court

BRIEF FOR RESPONDENT

Timothy V. Ramis*
James M. Coleman
G. Frank Hammond
Ty K. Wyman
O'Donnell, Ramis,
Crew & Corrigan
1727 NW Hoyt Street
Portland, OR 97209
Telephone: (503) 222-4402
Counsel for Respondent

Richard J. Lazarus
Washington University
School of Law
One Brookings Drive
St. Louis, MO 63130
Of Counsel

* Counsel of Record

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QUESTION PRESENTED

Respondent City of Tigard conditioned Petitioner's major modification of her commercial development in the City's downtown on Petitioner's dedicating to the public an easement on a fraction of her property to allow the City to mitigate (i) the increased storm water flow resulting from the development into a creek already prone to flooding and (ii) the increased traffic congestion resulting from the development in an area already subject to congestion problems.

The question presented is whether the City's imposition of this condition amounted to an unconstitutional taking of private property in violation of the Fifth and Fourteenth Amendments, where the condition substantially advanced the City's legitimate interests in preventing flooding and mitigating traffic congestion and those same interests would have allowed the City to prohibit the development.

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CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The relevant constitutional provision is the Takings Clause of the Fifth Amendment to the Constitution of the United States[1] as applied to the states through the Fourteenth Amendment. Statutory provisions and municipal ordinances are set forth in an appendix to this brief.[2]

STATEMENT

A. Petitioner's Application for a Major Modification of Her Store

Petitioner Florence Dolan is the owner of a chain of plumbing/hardware supply stores in the Portland, Oregon, metropolitan area. One of her stores is located in Tigard, a suburb with the population of 29,344 people, 1990 Census of Population (June 1992), which abuts Portland's southwest boundary and is within the Portland area urban growth boundary. In March, 1991, Petitioner filed an application seeking Respondent City of Tigard's approval of Petitioner's undertaking a major modification of the existing commercial development on property Petitioner owns in downtown Tigard. Petitioner's application included requests for variances from development code requirements. App E3.

Petitioner's proposed modification is the first step in a two-step project. Petitioner plans to start a second phase of retail development on the property at a later time. JA 3, Pet.

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[1] "[N]or shall private property be taken for public use without just compensation."

[2] The City's Comprehensive Plan (with Public Facilities Plan) has been lodged with the Court.

Cert. G9. The application at issue here describes plans to tear down the existing 9,700 square foot building and to replace it with a 17,600 square foot building. Petitioner also plans to replace a partially graveled parking lot with a paved parking lot having 39 spaces on the 1.67 acre site. Pet. Cert. G8, 9.

Petitioner's property is located on Main Street in Tigard, at the heart of the City's downtown central business district. R-Doc. No. B 51.[3] The property abuts Fanno Creek on the east side. JA 3. Pet. Cert. G8. The property is zoned CBD, Central Business District, and is also subject to another zone called AA, Action Area Overlay. Pet. Cert. G6. CBD zoning allows for many land uses. Examples include retail sales, civic uses, meeting halls, offices, restaurants, motels and high density residential (40 units per acre). CDC § 18.66.030.[4] All allowed uses are available to Petitioner.

The Action Area Overlay Zoning District, CDC Chapter 18.86, applies in areas of intensive land uses. CDC § 18.86.010. Its requirements are meant to ensure that projected public facility needs, pursuant to CDC Chapter 18.164, are addressed during redevelopment and intensification of use in the area. CDC § 18.86.040.A.

The intensity of the project controls the scope of the zoning review process. A change in use having major impacts on public facilities is classified as a "major modification" of an existing development and is subject to a

[3] "R-Doc. No. -" refers to the record letter assigned by the Oregon Supreme Court to items in the record in its Clerk's docket sheet. R-Doc. B 51 is found at App E2.

[4] "CDC" refers to the City of Tigard Community Development Code. The CDC sections cited are found in Appendix B.

discretionary approval process called "site development review." CDC § 18.120.020.A. A "minor modification" is not subject to site development review. CDC § 18.120.020.A.4. Petitioner does not dispute the threshold classification of the application as a "major modification."

Petitioner's March 1991 application was not her first attempt to get the City's approval of her proposed commercial development. In 1989, she filed an application based on virtually the same plan. Pet. Cert. G6. The City approved that first application, but made the approval subject to conditions. One condition was virtually identical to the condition now at issue. It required Petitioner to dedicate easements to allow the City to address flood hazards and traffic congestion, problems caused by the proposed development. Pet. Cert. D6 n.6.

Petitioner appealed the easement condition in the City's first approval to the Oregon Land Use Board of Appeals ("LUBA").[5] Petitioner argued that the flood plain dedication was a taking without compensation, violating the Fifth and Fourteenth Amendments to the United States Constitution. LUBA refused to decide Petitioner's takings challenge because she had failed to seek a variance:

> "Because the variance process of TCDC Chapter 18.134 provides petitioners with the means of seeking administrative relief from the disputed condition requiring dedication of a portion of their property, and petitioners have not pursued that

[5] LUBA is the first body to review local government land use decisions, and it has exclusive jurisdiction over such decisions. Oregon Revised Statutes ("ORS") § 197.825(1) (1993). For a full description of the Oregon state law framework for land use planning, see Briefs of Amici State of Oregon and 1,000 Friends of Oregon/American Planning Association.

relief, petitioners' federal and state taking claims are not ripe for review." Pet. Cert. E22.

Petitioner did not appeal LUBA's decision, but instead filed her March 1991 application. That application sought the variance LUBA had found lacking in Petitioner's initial application and is the application directly at issue in this case.

Petitioner had the burden to prove that she had satisfied all of the Tigard Development Code's requirements. CDC § 18.32.250.A.1. Petitioner's one-half page statement attempting to justify a variance, App E4, did not, however, contain the information that the City Code requires relating to storm drainage and traffic impacts, including an analysis of the impact of the development on the City's storm drainage and traffic systems. CDC §§ 18.32.050, 18.84, 18.120.090, .100, 18.164.030 and 18.164.100.[6]

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[6] The cited CDC sections when read together implement the comprehensive plan requirement that development address storm drainage and traffic impacts. With regard to drainage, the City's comprehensive plan provides in relevant part:

> "The City shall require as a precondition to development that:
>
> > "a. the site development study be submitted for development in areas subject to poor drainage, ground instability or flooding which shows that the development is safe and will not create adverse off-site impacts;
> >
> > "b. natural drainage ways be maintained unless submitted studies show that alternative drainage solutions can solve on-site drainage problems and will ensure no adverse off-site impacts."
>
> Comprehensive Plan Policy 7.2.1 p. II-43, App A29-30.

> "Proper administration of the floodplain areas relies heavily upon the availability of adequate information upon which to assess the environmental impacts of a project. The development, which creates the need, should be responsible for providing the city with the necessary data for making sound decisions. The burden is on the applicant to prove that a project will not adversely affect the environment or create undue future liabilities for the city." Comprehensive Plan Policy 3.2 Floodplains, Findings, p. II-14, App A20-21.

These policies are in turn implemented through the Sensitive Lands Chapter (CDC § 18.84) and Utilities Standards Requirements for Storm Drainage (CDC § 18.164.100).

Similarly, the comprehensive plan addresses transportation facilities by requiring that infrastructure be capable of serving the proposed development (Comp. Plan Policy 7.1.2(b)(1), App A27). This provision implements Statewide Planning Goal 11, "Public Facilities and Services," App D1-3, which mandates that urban development must be supported by appropriate levels of public facilities and that cities must plan for key facilities. "Key facility" is defined to include transportation. App D4. To address this requirement, the CDC requires the applicant to submit a site plan detailing existing and proposed streets, ways and easements, including those on surrounding properties. CDC § 18.120.120.A.3.

The exact nature of the street, sidewalk and bikeway improvements required of each development depends on the facts of the specific application. CDC § 18.164.020.B ("The City Engineer may recommend changes or supplements to the standard specifications consistent with the application of engineering principles."); CDC §§ 18.164.030, 18.164.070, 18.164.110. Developments that will "principally benefit" from bikeways identified on the adopted pedestrian/bikeway plan are required to be conditioned to include the cost of bikeway improvements. CDC § 18.164.110.B.

Petitioner likewise failed to use her opportunity to prove facts related to applicable standards through the introduction of evidence of the "possible negative or positive attributes of the proposal" or that there had been changes or mistakes in the comprehensive plan or the zoning map as it related to her application. CDC § 18.32.250.B. The submission of an incomplete application does not "negate the applicant's burden of proof." CDC § 18.32.050.G.

Based on the lack of information in Petitioner's variance application on drainage and transportation impacts, the City could have denied the application. CDC §§ 18.32.250.A, .E, 18.10.010, 18.16.010.B. Instead, the City undertook to evaluate the application based on facts otherwise available, as allowed by CDC § 18.32.060, and the City held a hearing on the matter. R-Doc. No. B 36. The City based its evaluation on studies and planning undertaken in fulfillment of its land use planning and regulation responsibilities. That information was available because, since the early 1970s, the City of Tigard, like all Oregon cities, has prepared extensive land use studies and plans to meet the requirements of state law.

B. Flood Control Planning

In 1978 the City undertook an engineering analysis of the City's drainage basins. R-Doc. No. F, Introduction, 3-1, Comprehensive Plan p. I 192-94, p. II 11-15. App A1-4, 15-24. That analysis resulted in the Tigard Master Drainage Plan (the "Drainage Plan"). R-Doc. No. F. The data within that plan serves as the basis for the City's Comprehensive Plan policies and regulatory provisions relating to floodplain management. Plan p. II 13-15, 42, App A19-24, 28-29; CDC § 18.164.100.D. The Drainage Plan documented the mild wet weather associated with Western Oregon's maritime climate and that flooding occurred in several areas along

Fanno Creek, including areas near Petitioner's property.[7] R-Doc. No. F 2-5 to 2-8; 4-2 to 4-6; Figure 4.1.

The Drainage Plan further found that without proper planning of land uses in the drainage area, urbanization within the Fanno Creek basin will significantly increase these flooding problems.[8] Increased flooding discharge will result in a rise in the flood plain elevation. R-Doc. No. F 4-29, 5-1 to 5-8. The Plan described the behavior of rainfall and runoff on urban land. According to the Plan, much of the rainfall in an urban setting lands on impervious surfaces such as roofs, sidewalks, parking lots, driveways and roads. Those surfaces rapidly conduct the rainfall off the land through the drainage system into the most available natural stream or drainage feature. This increased flow rate results in higher runoff peaks unless the drainage system is modified either to slow the rate of runoff or to increase its ability to carry water. R-Doc. No. F 4-29, 30; Chapter 5. Petitioner's proposed larger building and parking lot will dramatically increase the amount of impervious surface on her property. It will therefore increase storm water flows into Fanno Creek. R-Doc. No. F 4-29, Pet. Cert. G37.[9]

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[7] The picture on the cover of the study is of the December 1977 flood of Fanno Creek at the Main Street bridge. R-Doc. No. F, cover. Petitioner's property is located adjacent to that bridge between Main Street and Hall Boulevard. App E2.

[8] "Hall Blvd. to Main St. . . . Several major industrial and commercial structures mostly on the east side of the creek are just barely out of the 100-year flood plain. An increase in the 100-year flood flow caused by future urbanization of the basin could create severe flooding problems in this reach of the creek." R-Doc. No. F 4-5.

[9] The study also found that impervious surfaces such as parking lots and roofs are pollution sources. The impact of these non-point source polluters varies directly with the location of the area in relation

The City's Drainage Plan also suggested a series of improvements to the Fanno Creek Basin, including improvements next to Petitioner's property. Pet. Cert. G38, R-Doc. No. F 5-13 to 5-21, 7-2 to 7-5. The Drainage Plan called for significant channel excavation in the area just below the Main Street bridge next to Petitioner's property. Pet. Cert. G13, R-Doc. No. F 7-4, Table 8.2. The Plan projected that the recommended improvements would prevent the 100-year flood elevation in the area of Petitioner's property from rising by approximately two to five feet.

> "However, upstream of Hall Boulevard, the flood stage reductions range from two feet to over five feet. The severe over-bank flooding problems documented in Chapter 4 will be eliminated if the recommended improvements are built." R-Doc. No. F 6-8.[10]

The Drainage Plan also analyzed costs and funding alternatives. In analyzing cost apportionment, the Plan concluded that cost should be shared based on benefit. R-Doc. No. F 8-11. It identified two types of benefits: direct and indirect. Indirect benefits, such as elimination of nuisance flooding of roadways and limitations on emergency

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to the drainage system. Sources that are farther from the storm drainage system and require overland flow have a very low pollutant yield when compared with parking lots or structures that are, like Petitioner's store, located next to the drainage system. R-Doc. No. F 4-17, 4-18.

[10] The 100-year flow elevation at Petitioner's site is approximately 150 feet. The finished floor elevation of the proposed new building is 2-½ feet above that, at 152.5 feet. JA 3. Implementation of the City's comprehensive plan policies and regulations are designed to result in a "0 foot rise" in the floodway elevation. Comp Plan p. II 14, Policy 3.2.2(a), App A22.

access, accrue to the general public and justify the imposition of costs upon the public as a whole. Property, like that of Petitioner, which is located next to waterways, however, receives significant direct benefits from increased flood protection. The Drainage Plan accordingly recommended that property owners receiving direct benefits pay the greater cost associated with those benefits. R-Doc. No. F 8-11.

The City's Drainage Plan concluded with suggestions and recommendations for implementing ordinances. Those recommendations included insuring that flood plains remain free of structures, that areas in and near the flood plain be preserved as greenways or greenbelts to minimize flood damage to structures and to enhance joint use, that a site analysis be conducted at the time of development, that equitable cost sharing between the public and benefitted property owners occur, and that the 100-year flood plain be preserved by adoption of a sensitive lands ordinance, zoning and deeds for easements. R-Doc. No. F Chapter 9, 5-16 to 5-21. CDC Chapters 18.84, 18.86 and CDC § 18.164.100 and the Tigard Park Plan, R-Doc. No. E, carry out these recommendations. A major component of the park plan is the utilization of greenways which are identified as riparian areas, including Fanno Creek. R-Doc. No. E5. The greenway boundary is coterminous with that of the floodplain. App A21. Pursuant to the Tigard Park Plan, a specific Fanno Creek Park Plan has been adopted by the City. R-Doc. No. D 6-10. The concept of joint use of the floodplain for storm drainage, recreation and transportation is built into this plan through integration of the pedestrian/bikeway plan, R-Doc. No. C, App A9-14, with a recognition that whatever features or facilities are located in the park must be compatible with and tolerant of periodic flooding. R-Doc. No. D 6.

In reviewing Petitioner's application for a major modification of her downtown commercial property, the City's staff applied the standards set forth in CDC § 18.164.100, relating to storm drainage management.[11] Those standards require implementation of the improvement recommendations of the Drainage Plan. CDC § 18.164.100.C, .D. The Code calls for a site specific analysis of each development's effect on the storm water system. If, based on such analysis, the City finds that the proposed development will adversely impact the storm drainage system, the Code requires the City to withhold approval or impose mitigating conditions. CDC § 18.164.100.D.

In approving Petitioner's application, with conditions, the City did not require Petitioner to make structural improvements to the flood plain at her own expense, even though the Drainage Plan called for such improvements along the frontage of this property on Fanno Creek. Pet. Cert. G13, R-Doc. No. F 7-4, Table 8.2. The City required Petitioner only to dedicate an easement so that public agencies would be able to enter into the Fanno Creek drainage area to build and maintain there at public expense the improvements necessary to reduce flood hazards, including those threatening Petitioner's property. Pet. Cert. G38, G40-43.

C. Transportation Planning

Pursuant to the state's requirement that the City, like all other Oregon cities, plan for its future urban transportation

[11] Compliance with CDC Chapter 18.164 is required for site development review approval. CDC § 18.120.180.A.1.m.

needs,[12] the City completed a transportation study that considered all modes of transportation. Comprehensive Plan p. I 220-73. The City's plan includes the comprehensive pedestrian-bicycle pathway plan which was originally adopted in 1974. App A9-14, R-Doc. No. C. In developing the transportation element of the comprehensive plan, the City recognized that congestion caused by vehicles is a major problem in Tigard. App A34. The planning effort was based upon underlying judgments that bicycle and pedestrian pathway systems will reduce automobile trips and thereby reduce congestion. App A7. These modes of travel are intended to provide the opportunity to replace short vehicle trips for shopping purposes. App A5.

The Plan's criteria for path selection included reducing hazards on roads and providing safe access to schools, recreation areas, and major shopping areas. App A10. The Plan identified downtown Tigard, where Petitioner's site is located, as one of the major shopping areas. App A11. It also identified congestion in Tigard's downtown as a particular problem. It noted that Main Street, Pacific Highway and Hall Boulevard, the major streets serving Petitioner's property, are severely congested. App A31. The Plan found that bike paths can reduce auto-related congestion. App A7. The Plan thus called for careful planning of a system of bicycle and pedestrian pathways to integrate and facilitate access to shopping areas. App A6.[13]

[12] Statewide Planning Goal 12. App D3-4.

[13] Pursuant to the Plan, the City in 1982 added 3.7 miles of bike and pedestrian pathways through a combination of funding from street overlay and widening programs and contributions by adjacent development. App A8. By the time of Plan adoption, there were approximately 40 miles of sidewalk and bike paths in the City. App A6. 364,000 dollars of a 1989 voter-approved bond issue were spent on bike path construction projects. Public Facilities Plan p. 16. The 3-year capital improvement program

This path follows Fanno Creek and will connect Petitioner's store with the Civic Center and employment center along Hall Boulevard. App A14. Petitioner's property is located at the intersection of this pedestrian connection with Main Street. App E2.

The Action Area Overlay Zoning District requires that development facilitate pedestrian/bikeway circulation through the dedication of land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan. CDC § 18.86.040.A.1.b. These requirements are flexible. CDC § 18.164.110 regulates the extent of the dedication and construction requirement for each project. It provides a range of such requirements, depending on the particular benefit that the development will receive from the path. The condition here requires only the dedication of an easement for pathway purposes and does not require construction. Pet. Cert. G43.[14]

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adopted in 1991 includes $455,000 for specific bikeway improvements, and identifies pedestrian or bicycle path improvements as a specific portion of another $6,090,000 worth of transportation improvements. Public Facilities Plan p. 12, 13 (lodged with the Court).

[14] The City's final decision approves Petitioner's application subject to conditions. Pet. Cert. G43. The only condition related to the bike path is condition 1, which never mentions a construction requirement.

> "1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain (i.e., all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area."

To impose a bikeway construction requirement, the City must conclude that the development will "principally benefit" from the improvement. CDC § 18.164.110.B. The order contains no such

D. Adjustment Mechanisms

The CDC contains mechanisms that allow for adjustments to code standards to respond to the impacts of each individual project. First, the CDC directs city decision makers to consider any factual evidence from the parties relevant to existing conditions and applicable standards and criteria, and the possible negative or positive attributes of the proposal. CDC § 18.32.250.B. In response to such evidence, the City Engineer will determine whether adjustments in applicable city standards are warranted. CDC § 18.164.020.B.

In addition, CDC Chapter 18.134 permits an applicant to seek a variance to gain changes to otherwise mandatory Code requirements. The variance mechanism is intended to provide for a site-specific, case-by-case analysis of special circumstances, and to allow for a modification of standards to address those circumstances. CDC § 18.134.050. The City Council decided that Petitioner had failed to show that the variance request satisfied the variance approval criteria. Pet. Cert. G43. Petitioner did not appeal this portion of the City Council decision. *See* Petitioner's assignments of error before LUBA. Pet. Cert. D6, 7, 17.

E. The City's Conditional Approval

Based on Petitioner's application and argument, and considering its ordinances and planning studies, the City approved the application, with conditions. Pet. Cert. G43.

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conclusion, and as a result, no construction requirement is imposed. Oregon law requires that great deference be given to a local government's interpretation of its land use regulations. ORS § 197.829; *Clark v. Jackson County*, 313 Or. 508, 836 P.2d 710 (1992).

The City made findings that the development would increase storm water runoff into the creek, thereby increasing flood risks:

> "[T]he Commission finds that the required dedication would be reasonably related to the applicant's request to intensify the usage of this site thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek." Pet. Cert. G37.
>
> "The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the Fanno Creek floodplain, the Commission finds that the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." Pet. Cert. G37.
>
> "If the area within the 100-year floodplain is not dedicated as the variance application requests, the existing storm water drainage system would be affected because additional storm water runoff resulting from additional development, both from the subject site and elsewhere within the Fanno Creek drainage basin, is expected to increase flow

> within the creek and a rise in the 100 year flood elevation without the public's ability to make channel modifications in this area to offset the increase in stream flow." Pet. Cert. G40.
>
> "If dedication is required as specified by the Code, the channel of Fanno Creek in this area could be improved by public agencies as called for by the Master Drainage Plan. These channel improvements, here and elsewhere along the creek, would be expected to improve the channel's ability to transmit storm water flows thereby reducing the 100 year flood elevation and reducing the possibility of floodwater damages and threats to public safety." Pet. Cert. G40.

In imposing the conditions, the City made explicit findings that the decision was based on the studies in the Comprehensive Plan and the Drainage Plan:

> "As already noted, the Code at Section 18.120.080.A.8 and many other related sections (*e.g.*, Section 18.84.040.A.7) require dedication of floodplain areas . . . primarily to allow for public management of the storm water drainage system. These Code sections carry out Comprehensive Plan Policy 3.2.4 which requires dedication of all undeveloped land within the 100-year floodplain. Volume Two of the Plan at Section 3.2 discusses the City's objectives in regulating development within and adjacent to floodplain areas to avoid hazards to the public and to downstream properties. Volume One of the Comprehensive Plan at pages 192 and 193 provides a discussion of the reasons for development of a coordinated City-wide storm

> water management system. Volume One of the Plan also cites the Master Drainage Plan for the City produced by CH2M Hill Inc. [sic] in 1981 for a further discussion of the need for public management of the storm water drainage system and for measures intended to increase the flow efficiency of Fanno Creek and other drainage channels in the city." Pet. Cert. G38.

Petitioner asked to be excepted from the general rule, but she did not offer any evidence that the studies and planning results showing increased storm water impacts from development did not apply to her property. Pet. Cert. G37.

In evaluating the variance, the City also took into account its effect on the unusable portion of Petitioner's property located in the floodplain:

> "The requested variance to omit floodplain dedication would not affect possible uses permitted by the Code for this property. Dedication of the portion of the property within the 100-year floodplain of Fanno Creek would not be expected to diminish the usability or value of the property because the 100-year floodplain area is virtually unusable due to the year-round water flow of the Creek within a well defined narrow channel." Pet. Cert. G39, G40.

> "The Planning Commission finds that the applicant has failed to state what hardship would exist related to the requirement for floodplain dedication since this floodplain area is not buildable land under the City's regulations because the land in question within the floodplain

> is primarily the actual stream channel of Fanno Creek." Pet. Cert. G41.

At Petitioner's request, the easement area to be dedicated to the City as a result of Condition No. 1, will be treated as satisfying part of the mandatory landscaping requirements for the project. Pet. Cert. G28, G29.[15] Condition No. 4 requires the City at public expense to landscape the dedicated land. Pet. Cert. G45. Also at Petitioner's request, the City removed the requirement that Petitioner provide a land survey, transferring that cost to the public. Pet. Cert. G44, R-Doc. No. B36-38.

Condition No. 1 also requires the dedication of 15 feet along the floodplain for the bicycle/pedestrian path.[16] The City found that the proposed development is "anticipated to generate additional vehicular traffic" increasing congestion on nearby streets. Pet. Cert. G24. Based upon the retail sales nature of the larger building, the development is estimated to create 53.21 trips per week, per thousand square feet of

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[15] The honoring of that request resulted in Condition No. 4 of the approval, which required the submission of a revised landscaping plan showing the dedicated land noted in Condition No. 1 as included in the required landscaped area. Pet. Cert. G44, G45.

[16] Petitioner incorrectly claims that the City required her to transfer fee simple title. The City's authority to impose conditions upon approval of a site development application is granted by CDC § 18.32.250.E.2. That code section allows conditions to include the "dedication of easements." Condition No. 1 thus does not require the transfer of fee simple title. *See Portland Baseball Club v. City of Portland*, 142 Or. 13, 16, 18 P.2d 811, 812 (1933) ("In this state the rule is that where land has been dedicated or appropriated for a public street the fee in the street remains in the original owner subject only to the public easement and, upon the vacation of the street, it reverts to the owner of the abutting premises freed from the easement.").

gross floor area (approximately 937 trips). Pet. Cert. G14, G15.

The City further found that the required bicycle path connecting Petitioner's property to the Civic Center and the City's main employment center along Hall Boulevard, App E2, will help mitigate the increased traffic on the City's already congested streets.

> "Creation of a convenient, safe pedestrian/bicycle pathway [sic] system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." Pet. Cert. G24.

> "It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." Pet. Cert. G24.

F. History of Administrative and Judicial Review

Petitioner appealed the City's order to LUBA, challenging only the constitutionality of the dedication requirement. She did not challenge the findings or the sufficiency of the evidence supporting the City's decision. LUBA affirmed and the Oregon Court of Appeals, in turn, affirmed LUBA's decision.

The Oregon Supreme Court likewise affirmed. Like the two preceding tribunals, the court concluded that Petitioner had not challenged the City's factual findings or public purposes, and that the focus of her assignments of error was limited to her interpretation of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The Oregon Supreme

Court held that the City's uncontested findings established the connection between the development's impacts and the exaction required by *Nollan*. Justice Peterson dissented.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the City struck an appropriate balance between Petitioner's private interest and that of the public by approving Petitioner's application to undertake a major modification and expansion of her existing retail business, but requiring Petitioner to mitigate the adverse impacts of the development. The conditions are well within the City's established police powers, because they substantially advance the City's legitimate interests in preventing flooding and mitigating traffic congestion. At the same time they do not amount to an unconstitutional taking of private property because the City could have denied Petitioner's permit application based on those same traffic congestion and drainage concerns, either alone or in combination with other development.

Contrary to Petitioner's claim, a municipality does not take private property in violation of the Fifth and Fourteenth Amendments when, instead of denying a development application based on legitimate public concerns, the City acts far less harshly by addressing those same concerns through conditions. Indeed, were the rule otherwise, the Takings Clause would discourage a municipality from engaging in the very "weighing of private and public interests" that the Clause seeks to promote. *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980). A municipality would be effectively required to deny development permits altogether to await completion of necessary public facilities rather than, as the City has done here, better accommodate commercial development projects by having each contribute a share to those planned facilities.

Nor, for that same reason, is there any merit to Petitioner's suggestion that any conditions that a municipality imposes must be subject to strict judicial scrutiny under the Takings Clause. Strict scrutiny does not generally apply to denials of applications to develop commercial property. It would therefore be wholly illogical, if not somewhat perverse, to apply such heightened judicial scrutiny whenever a municipality decided to make greater efforts at accommodation. Likewise, Petitioner's claim that the City must prove a precise symmetry between the condition and the impacts is without merit. Petitioner's major modification passed the threshold the City rationally established setting the point at which impacts justify exactions of this type.

In this case Petitioner's takings claim especially lacks merit because the City imposed a permit condition reasonably related in character and degree to the impacts that the City found Petitioner's greatly expanded store and parking lot to cause. Dedication of an easement is a reasonable response to the flood prevention and traffic congestion concerns directly related to Petitioner's proposed development. Unlike the landowner in *Nollan*, 483 U.S. 825, moreover, Petitioner will receive disproportionate benefits from the construction at public expense of drainage systems and pathways on those easements. The enhanced flood protection measures necessarily inure primarily to the benefit of those, like Petitioner, whose property is located in and along the floodplain. Efforts to reduce traffic congestion likewise disproportionately benefit those, like Petitioner, whose economic expectations depend on the public's easy access to their retail business.

Indeed, for this reason, Petitioner's reliance on this Court's decision in *Nollan* is entirely misplaced. The relative intrusiveness of an easement dedication on Petitioner's downtown commercial property bears scant

relation to the privacy and security interests of the Nollans in their beachfront residential property. Petitioner's store (unlike the Nollans' home) profits by inviting the public and from increased access. The condition also does not offend Petitioner's reasonable expectations. The store is located in the heart of the City's developing downtown, where significant infrastructure and improvement are inevitably necessary when major developments occur. Moreover, these improvements will have minimal adverse economic impact and, quite possibly, will increase the market value of Petitioner's property.

Rather than amounting to a mere subterfuge for taking Petitioner's property, the City's conditional approval of her commercial development plan reflected careful consideration of the impacts of such development in the City's downtown. Because Petitioner never used the available adjustment mechanisms to introduce evidence to support her claims that the project would not cause the adverse impacts the City projected, this Court should reject those claims here. This Court should affirm the judgment of the Oregon Supreme Court, rejecting Petitioner's takings claim.

ARGUMENT

THE CONDITION THAT THE CITY IMPOSED ON PETITIONER'S MAJOR MODIFICATION OF HER DOWNTOWN COMMERCIAL PROPERTY DID NOT RESULT IN A TAKING BECAUSE THE CONDITION SUBSTANTIALLY ADVANCED LEGITIMATE STATE INTERESTS AND WAS REASONABLY RELATED TO THE PROJECTED IMPACTS OF PETITIONER'S PROPOSED DEVELOPMENT

This case concerns a municipality's ability to allow a major commercial development in its central business district while taking those steps necessary to address the projected spillover effects of that development. Like the takings issue itself, a municipality's decision whether to approve a commercial development "necessarily requires a weighing of private and public interests." *Agins*, 447 U.S. at 261.[17] A judicial ruling that the municipality has violated the Takings Clause by either denying a development permit or conditioning its approval "is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." *Agins*, 447 U.S. at 260; *accord Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988); *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980).

[17] This balance reflects the fundamental insight "that property ownership is inevitably social and that the social context within which property exists is itself a source of responsibilities, as well as rights, of ownership." Gregory Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 Const. Commentary 259, 269 (1992).

The City struck an appropriate balance and did not single Petitioner out because the undisputed findings in the record show that Petitioner's major retail development will have significant flooding and traffic impacts. Those impacts would have allowed the City to deny the application without violating the Takings Clause. Instead of denying the application, however, the City imposed a condition on its approval of the development. That condition addresses the impacts that a denial of Petitioner's application for a major commercial development would have prevented. Indeed, the record shows without dispute a direct cause and effect relationship between the condition and the impacts of the commercial development. Moreover, the City reasonably tailored the condition in both character and degree to the circumstances of this case. Accordingly, this Court should affirm the judgment of the Oregon Supreme Court.

A. This Court's Ruling in *Nollan v. California Coastal Commission* Does Not Support Petitioner's Radical Reading of the Takings Clause

The City agrees that *Nollan v. California Coastal Commission* is the starting point for evaluating the City's condition under the Takings Clause. But Petitioner's takings claim fundamentally misapprehends the Court's ruling in *Nollan*. In particular, Petitioner is under the mistaken impression that *Nollan* marked a dramatic shift in this Court's takings jurisprudence in two ways. First, Petitioner implies that this Court eliminated the presumption of constitutionality that the Court has long applied to legislative decisions. Second, Petitioner believes that to sustain a police power regulation meant to redress the public burdens of a proposed land development, the government must prove the precise extent of those burdens and that it has precisely calibrated its response to those burdens. *Nollan*, however, supports neither of these revolutionary propositions.

1. *Nollan* Did Not Reverse the Normal Presumption of Constitutionality That Attaches to the City's Action

It is well settled that where, as in this case, a private party claims that a state law is unconstitutional, "the existence of facts supporting the legislative judgment is to be presumed." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).[18] Land use regulation is certainly no exception. So long as the validity of the regulation is "fairly debatable, the legislative judgment must be allowed to control." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) ("the usual presumption of constitutionality"); *see also Berman v. Parker*, 348 U.S. 26, 32 (1954) (legislative judgment "well-nigh conclusive"). Moreover, the presumption "attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies." *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935), *cited with approval in St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 83 (1936) (Brandeis, J., concurring); *see also* 1 Norman Williams, Jr., American Planning Law § 5B.05 (1988 rev. supp 1993) (administrative acts entitled to presumption of validity); *cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981) (Court hesitated to disagree with common sense judgments of local government where nothing in the record suggested those judgments were unreasonable). Hence, the Court has, in a variety of constitutional contexts repeatedly made clear that the burden of proof -- to rebut the validity of

[18] The presumption of validity of legislative enactments is deeply rooted in this Court's jurisprudence. Chief Justice Marshall identified the fundamental canon "that the presumption is in favour [sic] of every legislative act, and that the whole burthen [sic] of proof lies on him who denies its constitutionality." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 436 (1827).

legislative findings and the constitutionality of the legislature's judgment -- rests on those challenging the government's action. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (This Court held that the applicants had failed to "satisf[y] their burden of showing that the Subsidence Act constitutes a taking."); *see also, e.g., Northwest Airlines, Inc. v. County of Kent*, 62 U.S.L.W. 4103, 4108 n.18 (1994); *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 464 (1981) ("But States are not required to convince the courts of the correctness of their legislative judgments.").[19]

Even more fundamentally, not only does *Nollan* lack any suggestion of an intent to refute this longstanding canon of judicial review, but this Court has since *Nollan* repeatedly disclaimed any contrary intent. In *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989), the Court rejected a takings claim where the Federal Government, like the City in this case, claimed that an exaction -- a user fee -- was necessary to redress burdens imposed on the public.[20] In rejecting the contention that this exaction did not bear sufficient relation to the burdens imposed by the party's action, the Court stressed that "the burden must lie with [the challenging party] to demonstrate that the reality of [the government exactions]

[19] In *Carolene Products Co.*, 304 U.S. at 152 n.4, the Court limited heightened judicial scrutiny to review of regulations affecting either fundamental constitutional rights or discrete and insular minorities in a way that circumvents their political power. That opinion, along with cases such as *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), and *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), make clear the applicability of the presumption of constitutionality to economic regulations.

[20] The user fee at issue in *Sperry* was a uniform percentage charge imposed on successful American claimants before the Iran-United States Claims Tribunal. *See* 110 S.Ct. at 392.

belies [their] express language [stating that they are meant to reimburse the government for its costs] before we conclude that the [exactions] are actually takings. That burden has not been met." *Id.* at 394 (citation omitted).

Recently, in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), the Court stressed that it was not "foisting on the State 'the burden of showing [its] regulation is not a taking.'" *Id.* at 2893 n.6 (brackets in original) (majority opinion quoting Blackmun, J., dissenting at 2909). The Court flatly stated that reading any such intent into the Court's decision would be "wrong." *Id.* In *Lucas*, the Court stressed, the plaintiff had affirmatively established that the regulation had "denied him economically beneficial use of his land." *Id.*

Petitioner here has made no such showing. Petitioner has not challenged the validity of the City's studies, planning or factual findings showing the nexus under *Nollan* (*see* pages 35-37, *infra*); she has not demonstrated that the challenged condition fails to substantially advance legitimate state interests or deprives her of economically viable use of her property; and she has not shown that the City's condition does not address the same legitimate state concerns addressed by the police power restriction that the condition effectively lifts. No doubt that is why Petitioner seeks instead to reverse the normal burdens of proof and presumptions of constitutionality. *Nollan*, however, provides no support for this Court's doing so.

2. *Nollan* Does Not Demand a Strict Proportionality of Exactions and Impacts

Nollan likewise provides no support for Petitioner's related claim that the City must quantify and prove a perfect symmetry between the impacts and the condition. The Court

in *Nollan* took care to avoid selecting a standard for deciding the required "fit" between the exaction and the development's impact. The Court instead applied a "reasonably related" test and left open what level of scrutiny might be warranted. *See Nollan*, 483 U.S. at 838.

Petitioner nonetheless faults the Oregon Supreme Court's characterization of the test for determining the required relationship between an exaction and the development's impacts. That court required a "reasonable relationship." Pet. Cert. A13. Petitioner further faults the Oregon Supreme Court for failing to require perfect symmetry between the City's condition and the impacts of Petitioner's proposed development of her commercial property.[21]

The purpose of the nexus analysis announced in *Nollan*, however, belies any assertion that it was intended to trigger the type of strict scrutiny applied to government restrictions of fundamental rights, like free speech, or to government

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[21] Petitioner's own argument only serves to undermine her criticism of the Oregon Supreme Court and to underscore the futility of her belief that wording the takings test slightly differently offers a judicial panacea to the takings puzzle. Petitioner cannot settle on any consistent formula for the takings inquiry, but posits several contradictory formulations. Those formulations include the following: "'essential nexus'" (Pet. Br. 12); "wholly out of proportion" (*id.*); "no demonstrated relationship" (*id.* at 19); "reasonably direct and proportional relationship" (*id.*); "'close fit'" (*id.* at 20); "close, specific and direct link" (*id.* at 21); "proportionate cause-and-effect relationship" (*id.* at 22); and "substantial nexus" (*id.* at 23). The *amici* supporting Petitioner employ still other verbal formulations, at least some of which are apparently intended to impose differing degrees of scrutiny. As the Oregon Court of Appeals noted, Petitioner has never explained how the semantic difference between her test(s) and the reasonable relationship test necessarily makes a difference. Pet. Cert. C7.

classifications based on suspect classifications.[22] *Nollan* is devoid of any suggestion that the Court adopted Petitioner's far more radical view of the Takings Clause. Indeed, quite the opposite is true. The Court in *Nollan* reasoned that some means-ends fit was necessary to negate the possibility of the government's using its police power authority as a mere subterfuge for obtaining exactions that would otherwise constitute a taking. 483 U.S. at 841. The *Nollan* opinion stressed that its views were consistent with every other court to consider the issue except those of California. 483 U.S. at 839. Because many of those judicial opinions favorably cited in *Nollan* use the same "reasonable relationship" test that the Oregon Supreme Court applied in this case,[23] *Nollan* can hardly be read as condemning that analytical framework. *Nollan* is instead better understood as simply underscoring that Takings Clause concerns require a meaningful and careful application of the reasonable relationship test and not mere judicial lipservice. In this way, the reasonable relationship test fulfills the goals of preventing unfair singling out and governmental subterfuge. *Id.* at 840-41.

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[22] This Court has reserved strict judicial scrutiny for circumstances, unlike this case, where the challenged government regulation -- either by classification or by effect -- impinges on a fundamental constitutional right or is drawn upon inherently suspect distinctions such as race, religion, or alienage. *See, e.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973); *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

[23] *See Parks v. Watson*, 716 F.2d 646 (CA9 1983); *Mackall v. White*, 85 A.D.2d 696, 445 N.Y.S.2d 486 (1981); *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668 (Colo. 1981); *Lampton v. Pinaire*, 610 S.W.2d 915 (Ky. Ct. App. 1980); *Call v. City of West Jordan*, 614 P.2d 1257 (Utah 1980); *Noland v. St. Louis County*, 478 S.W.2d 363 (Mo. 1972); *Schwing v. City of Baton Rouge*, 249 So.2d 304 (La. Ct. App.), *application denied*, 259 La. 770, 252 So.2d 667 (1971); *Jenad, Inc., v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673 (1966).

This Court's decisions both before and after *Nollan* support the state court's wording of the test, as well as the impropriety of the Petitioner's exacting "means-ends" test.[24] Contrary to Petitioner's contention, the Takings Clause does not require the City to demonstrate a mathematically equivalent relationship between the exaction and the impacts. "That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it." *Keystone*, 480 U.S. at 487 n.16. "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the

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[24] The source for Petitioner's argument against the "reasonable relationship" test is the requirement that the condition "substantially advance" legitimate state interests. She reads this statement as necessarily requiring a strict review of the relationship between the exaction and the development's impacts. However, the cases leading to Petitioner's argument fall far short of supporting her conclusion. The "substantial advancing" requirement finds its origins in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). *Agins*, 447 U.S. at 260. In *Penn Central*, this Court explained that the substantial advancing test in *Nectow* required only an inquiry into the *reasonableness* of the connection between the challenged regulation and the state purpose it is meant to advance: "When a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry focuses upon whether the challenged restriction *can reasonably* be deemed to promote the objectives of the community land-use plan, and will include consideration of the treatment of similar parcels." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 133 n.29 (1978) (citing *Nectow*, 277 U.S. 183) (emphasis added). Other decisions of this Court have adopted similar interpretations. *See, e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) ("[C]ourts generally . . . have sustained the [zoning] regulation if it is *rationally related* to legitimate state concerns and does not deprive the owner of economically viable use of his property." (citing *Agins*, 447 U.S. at 260) (emphasis added)); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977) (stating a land use applicant's right to be free from "arbitrary or irrational zoning actions" (citing, *inter alia*, *Nectow*, 277 U.S. 183)).

basic principles of our Government . . ." *Sproles v. Binford*, 286 U.S. 374, 388 (1932); *see Sperry*, 110 S. Ct. at 394 (Takings Clause does not require that government user fee be "precisely calibrated" to the burdens imposed on the government). For these reasons, this Court has long stressed that "[t]he inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. . . . [I]n some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." *Euclid*, 272 U.S. at 388-89; *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (refusing to adopt "an unnecessarily rigid burden of proof"). Two years after *Nollan*, moreover, the Court made clear that "the Just Compensation Clause 'has never been read to require the . . . courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received' in determining whether a 'taking' has occurred." *Sperry*, 110 S.Ct. at 394 n.7 (quoting *Keystone*, 480 U.S. at 491 n.21).

Petitioner apparently wants the Court to return to those *Lochnerian* days of heightened judicial review of economic regulation, but now under the guise of takings analysis rather than through that already-discredited substantive due process analysis. Petitioner, however, can find no support for such an unduly activist judicial approach to takings analysis in this Court's precedent during the past fifty years. This Court's decision in *Nollan* is no exception, which is why the Court just last Term unanimously maintained that where a due process challenge to regulatory action fails, "'it would be surprising indeed to discover' the challenged [action] nonetheless violating the Takings Clause." *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2289

(1993), (quoting *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986)).

B. This Court's Decision in *Nollan* Supports Rejection of Petitioner's Takings Claim

In *Nollan*, this Court identified three criteria to be used in determining whether a condition of development violates the Takings Clause. First, whether legitimate state interests exist that would allow the government constitutionally to forbid the development without paying compensation. *Nollan*, 483 U.S. at 836. Second, whether the proposed condition substantially advances the same legitimate interests that a denial would have served. *Id.* at 837. Finally, whether the condition is reasonably related in character and degree to the impacts of Petitioner's proposed development. *Id.* at 838. The City's condition easily satisfies all three criteria.[25]

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[25] As discussed above (pages 26-31, *supra*), the City believes that the Oregon Supreme Court's formulation of this last aspect of the takings inquiry -- as requiring a "reasonable relationship" -- accurately reflects the Takings Clause design to ensure that the police power restriction being lifted by the condition is not a mere subterfuge for obtaining the easement exaction. But, as also described below (pages 35-37, 38-49, *infra*), the City believes that the relationship here is substantial enough to pass muster even under a more heightened standard of scrutiny. Ultimately, of course, the significance of any test depends less on its precise wording than on how courts apply it in practice. For instance, the "reasonable relationship" test is often contrasted with a test that, based on its wording -- "specifically and uniquely attributable" -- seems to demand a closer relationship between the exaction and the development impacts that it seeks to redress. There are times, however, when the judicial analysis does not match the superficial strictness of the particular test chosen. In *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966), for example, the court combined the two approaches by ruling that an exaction can satisfy the "specifically and uniquely attributable" requirement by possessing a "reasonable connection"

1. The City Could Have Forbidden the Development Without Paying Compensation

A land use regulation forbidding certain uses does not result in a taking unless it fails to "substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260 (citations omitted); *accord Lucas*, 112 S. Ct. at 2894; *Nollan*, 483 U.S. at 834. Here, prohibition of Petitioner's development, at least until adequate public facilities were in place, would have substantially advanced at least two legitimate state interests: the prevention of flooding and mitigation of traffic congestion. A prohibition of Petitioner's expansion plans would not have denied Petitioner economically viable use of her property.

The legitimacy of the interests on which the City relies cannot be seriously disputed; nor can it be denied that the City's refusal to allow the development would have "substantially advanced" those interests. Although the Court has not elaborated standards for deciding what constitutes a "legitimate state interest" or what is required to show that the government action substantially advances those interests, the Court has "made clear . . . that a broad range of governmental purposes and regulations satisfies these requirements." *Nollan*, 483 U.S. at 834-35; *accord Agins*, 447 U.S. at 262 (accepting "careful and orderly development of residential property with provisions for open-space areas" as a legitimate state interest). Of particular pertinence here, the Court has strongly endorsed the longstanding legitimacy of police power measures restricting development based on "the ill effects of urbanization," including "air, noise and

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to development impacts. 28 Wis. 2d at 618, 137 N.W.2d at 448. The City is confident that its actions meet the basic test of a reasonable relationship, however that test is precisely worded.

water pollution, traffic congestion . . . hazards to geology, fire and flood, and other demonstrated consequences of urban sprawl." *Agins*, 447 U.S. at 261 & n.8 (citation omitted).

No doubt for this reason, Petitioner freely admits that the City's interests in preventing flooding and reducing traffic congestion are valid, indeed "laudable." J.A. 26. Because the record shows that Petitioner's proposed store would increase flood problems and traffic congestion (see pages 6-7, 13-15, 17-18, *supra*), the City could have prevented these problems simply by denying Petitioner's application. The cause of the problems then would never have come into existence. Accordingly, by denying the application, the City would have substantially advanced legitimate state interests.[26]

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[26] Petitioner attempts to obfuscate the constitutional analysis by suggesting that the Tigard Development Code did not have a section allowing the City to deny her application. Petitioner's contention is incorrect and ultimately irrelevant.

Petitioner is incorrect in her assertion that she met all of the approval requirements. The Tigard Development Code required Petitioner to show the development's impacts on the drainage and traffic systems and to address those impacts. She failed to meet her burden. *See* note 6, *supra* and accompanying text. The City could have denied the application on that ground alone. CDC § 18.32.250.

In any event, a conditional permit approval is, by its very nature, a formal government statement that the permit is denied absent compliance with the condition. Certainly nothing in the Takings Clause intimates that government must choose between granting and denying a permit. It would be strange indeed to construe the Takings Clause to prevent government from conditioning a permit where, as in this case, the Clause does not otherwise forbid the government's outright denial of the permit. *Cf. New Orleans*, 427 U.S. at 305 ("[W]e are guided by the familiar principles that a statute is not invalid under the Constitution because it might have gone farther than it did . . . ." (internal quotations and citations omitted)).

Forbidding the development would also not have denied Petitioner economically viable use of her property. A store is operating on the property, and, following a denial, Petitioner could still have operated that store. Hence, Petitioner "may continue to use the property precisely as it has been used . . . . So the law does not interfere with what must be regarded as [Petitioner's] primary expectation concerning the use of the parcel." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978). Petitioner has accordingly never claimed that, had the City refused approval, the City would have denied her economically viable use of the land.

2. The Condition Substantially Advances the Same Legitimate State Interests That a Prohibition Would Have Served

The record in this case, including the City's comprehensive planning documents and specific factual findings, further establishes that the condition will mitigate the drainage and traffic impacts of Petitioner's proposed expansion of her existing retail store in the City's central business district. These are precisely the same legitimate state interests that would have warranted the City's prohibiting the project.

Although Petitioner (understandably) seeks to obscure the point, her challenge is actually quite narrow. As was observed by both Oregon appellate courts, Petitioner has *never* disputed the factual correctness of the findings and the evidence supporting the condition. She has not and cannot, for example, claim that substantial evidence does not support the findings. Having failed to dispute their validity in the courts below, which uniformly upheld those findings, it is

simply too late for Petitioner to dispute those findings before this Court. *See Lucas*, 112 S. Ct. at 2896 n.9.[27]

Putting aside Petitioner's rhetoric, the findings establish that Petitioner's new store will significantly affect the City's storm drainage and traffic systems. Because she did not challenge the basis for the findings, Petitioner concedes that the development's increased impervious surface is "expected to increase the amount of storm water runoff from the site to Fanno Creek." Pet. Cert. G37. Similarly, the uncontested findings establish that the major expansion will increase traffic congestion on the City's already jammed streets. Pet. Cert. G24. Thus, Petitioner's bald assertion that her development "will not impair or destroy in any way any manner of use by the general public of Fanno Creek or the city's Main Street on which the property fronts" (Pet. Br. 17) is misleading at best and cannot be raised at this late date.

a. The Condition Relates to the Interests Served by Denial

The City's condition addresses the same impacts that a denial would also have addressed. Petitioner devotes most of her energy to an argument that the findings did not show that the condition will address the uncontested impacts. She

[27] ORS Chapter 197 establishes the framework for review of local land use decisions in Oregon. A local government's factual findings are presumed to be true if supported by substantial evidence in the record, even if a reviewing court would draw a different conclusion from the same evidence. *See, e.g., Younger v. City of Portland*, 305 Or. 346, 360, 752 P.2d 262, 270 (1988). The City's factual determination of public service needs generated by a proposed development are binding if supported by substantial evidence in the whole record. ORS § 197.830(13)(b). When there are disputed allegations of constitutionality, LUBA on request can take evidence and make findings of fact, *id.*, but Petitioner did not request such a hearing.

incorrectly claims that the findings are based on assumption and supposition. However, the administrative record shows otherwise.

When the City's findings are viewed in their historical context, especially in light of the years of planning documents and studies upon which the City's applicable ordinances are based, the reasonableness of the City's projections of the impacts of Petitioner's development plan cannot be seriously disputed. The City's Drainage Plan and studies evidence a reduction in flood impacts if flood plains are dedicated and improved as called for in the Tigard Development Code. *See* pages 6-10, *supra*. The City's Transportation Plan also demonstrated both how and why the City needed to address congestion problems in the City's downtown and justifiably expected that the bicycle/pedestrian pathway would reduce congestion. App A7, *see also* Arthur C. Nelson, *Public Provision of Pedestrian and Bicycle Access Ways: Public Policy Rationale and the Nature of Private Benefits*, 11 (Center for Planning Development, Georgia Institute of Technology, Working Paper Series, 1994). ("Pedestrians and bicyclists occupying dedicated spaces for walking and/or bicycling . . . remove[s] potential vehicles from streets, resulting in an overall improvement in total transportation system flow.").[28]

Hence, there is absolutely no merit to Petitioner's repeated suggestion that the City simply assumed the existence of entirely speculative and hypothetical impacts of Petitioner's proposed development and exactions. The City acted on uncontested evidence showing a cause and effect

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[28] The effectiveness of bicycle and pedestrian pathway systems in reducing automobile trips and vehicle miles travelled has been proven empirically. *See Amicus* Br. Rails-to-Trails Conservancy & League of American Wheel Men.

relationship between Petitioner's planned development and its likely impacts in fashioning the condition.

b. The Mere Fact that the Condition Will Incidentally Serve Other Legitimate Purposes Does Not Render it Impermissible

Likewise lacking in merit is Petitioner's contention that the City's condition violates the Takings Clause because it incidentally furthers interests other than mitigating flooding and traffic congestion (such as parks and greenspaces). Nothing in the Takings Clause, however, forbids the government from serving many legitimate public interests where, as in this case, the condition is otherwise constitutional. *See Stephenson v. Binford*, 287 U.S. 251, 276 (1932) (citing *Ellis v. United States*, 206 U.S. 246, 256 (1907)); *see also United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). Thus, although the dedication will benefit the public in several ways, its constitutionality turns on whether the dedication would have been justified based solely on the government's mitigating the adverse flooding and traffic congestion problems that Petitioner's major development would create.

As already described (pages 6-12, and 35-37, *supra*), the City's condition in this case is amply justified by the City's need to address flood hazards and traffic congestion. That the City has also sought to allow the public to have access for recreational purposes renders the condition no more infirm than would be a routine sidewalk dedication. The primary purpose of a sidewalk dedication is public transportation. That sidewalks are also a major source of

recreational opportunities plainly does not render invalid an otherwise proper dedication of an easement for the purposes of sidewalk construction.

The record in this case also provides no support for Petitioner's repeated suggestion that the City is using its interests in preventing flooding and traffic congestion as a sham. Contrary to Petitioner's intimations, the City's findings make clear that the exaction requirement primarily addresses flooding problems in Fanno Creek. Pet. Cert. G38. Under the City's plans, the greenspace and park benefits linked to the dedication are secondary to the flood control purposes motivating the condition.[29] The easement dedication is necessary to address flooding concerns in the first instance. It is only upon the creation of such an easement dedicated to flood control that the City's park plans allows for joint recreational use, subordinating that use to flood control concerns. *See* page 9, *supra*.

3. The City's Condition is Reasonably Related in Both Character and Degree to the Anticipated Impacts of the Proposed Development of Petitioner's Downtown Commercial Property

Petitioner claims that the City's condition violates the Takings Clause because it is "wholly out of proportion" to the new store's impacts. Pet. Br. 12. But more than Petitioner's own *ipse dixit* is required to support such a claim. Indeed, because Petitioner chose not to offer any evidence when given opportunities to do so before the City, Petitioner is especially hard pressed to sustain her claim now.

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[29] The channel improvement design criteria in the Drainage Plan call for the incorporation of park and greenbelt areas into channel and drainage works. "Aesthetics and/or recreational benefits should be secondary to the drainage function." R-Doc. F 5-17 to 21.

In all events, as described below, the record in this case makes plain that the City did not unfairly single out Petitioner for disparate treatment. Nor has the City asserted its legitimate interests in flood control and prevention of traffic congestion as a subterfuge for unfairly taking Petitioner's property without compensation. Instead, the City has imposed a condition reasonably related in character and degree to the burdens and benefits resulting from Petitioner's proposed major modification of her commercial property.

Petitioner's contrary view appears to rest on the following syllogism: (1) This Court in *Nollan* held that an easement condition amounted to an unconstitutional taking; (2) The City in this case is imposing an easement condition on Petitioner; therefore (3) The City in this case, like the state in *Nollan,* must be deemed to have unconstitutionally taken the land owner's property. Petitioner's logic is, however, multiply flawed, as is her takings claim.

The only similarity between this case and *Nollan* is that the government regulator in both cases approved permit applications based on the condition of an easement dedication. Because this Court in *Nollan* found that an easement condition can serve as a permissible basis for lifting an otherwise applicable police power requirement, Petitioner's reliance on *Nollan* is entirely misguided. *Nollan* stands for the proposition that, notwithstanding the physically intrusive character of an easement condition, such permit exactions do not necessarily offend the Takings Clause.[30]

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[30] Petitioner appears in her merits brief to have abandoned the contention made in her petition that the condition effected a *per se* taking, and rightly so. To be sure, government action resulting in uninvited physical occupation of property may constitute a taking *per se* in some circumstances. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). But not where, as in this case, the land owner is seeking the government's permission to take an action that

Hence, although the Court in *Nollan* held that the Takings Clause thereby forbade exaction of an easement -- the granting of lateral access along the beach -- when such a condition did not address the purported reason for the permit -- a loss of visual access from the road -- the Court simultaneously stressed that an easement directly addressing losses of visual access would not be similarly infirm. To that explicit end, the Court posited that the state in *Nollan* could have permissibly required an easement creating a "viewing spot" on the landowner's property, without triggering takings concerns. 483 U.S. at 836.

The City's justification for its easement dedication in this case is even stronger than *Nollan's* hypothetical "viewing spot." First, the relationship between the purposes of the police power restrictions being lifted and the condition is at least as direct, if not more so. The police power restrictions being lifted are directed at flood prevention and traffic congestion concerns. These are the exact same concerns that the easement condition addresses. The drainage easement will reduce the flood hazards caused by storm drainage. *See* pages 6-10, *supra*. The bicycle/pedestrian pathway will reduce traffic congestion. *See* pages 10-12, *supra*; *see also Pennell*, 485 U.S. at 20 (Scalia, J., concurring in part and dissenting in part) ("[T]he common zoning regulations requiring subdividers . . . to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion.").

The City's condition is likewise more reasonably related in both character and degree to the anticipated impacts of

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will affect the City's substantial interests. *See Yee v. City of Escondido*, 112 S. Ct. 1522, 1528 (1992); *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 251-52 (1987).

Petitioner's development than was *Nollan's* hypothetical viewing spot to visual access concerns. An easement is precisely the kind of condition necessary to address directly the type of storm drainage and traffic congestion problems to which Petitioner's development will contribute.

The City's easements are also far less intrusive in character than the exaction in *Nollan*. Most fundamentally, unlike *Nollan*, this case involves commercial, not residential, property. It therefore does not implicate this Court's traditional concern with government actions affecting residential property. *See, e.g., United States v. Orito*, 413 U.S. 139, 142 (1973) ("The Constitution extends special safeguards to the privacy of the home."). Public access can be an anathema to private residential property, which often finds its value -- both market and personal -- in its isolation from the public.

By sharp contrast, the same cannot be said about Petitioner's downtown commercial property. Petitioner hopes to build a bigger store to *attract* members of the public. The required easements are completely consistent with, and, indeed, advance that purpose. They reduce the hazards of flooding and enhance the general accessibility to the public of Petitioner's retail store. The easement will aid in the connection of the store to potential customers in the civic and employment center along Hall Boulevard. The easements thereby likely provide substantial value to Petitioner's property, rather than detract from it. But, in any event, "[t]here is nothing to suggest that preventing [Petitioner] from prohibiting [the easements] will unreasonably impair the value or use of [her] property as a [retail store]." *PruneYard Shopping Center,* 447 U.S. at 83.

The condition imposed here, unlike that in *Nollan*, also creates true "reciprocity of advantage." *Pennsylvania Coal*

Co. v. Mahon, 260 U.S. 393, 415 (1922). The City's Drainage Plan demonstrated that floodway improvements will disproportionately benefit those like Petitioner who own property next to the floodplain. *See* page 8, *supra*. Petitioner's finished floor elevation of 152.5 feet places it within the 2-5 foot range by which the 100-year flood elevation is projected to rise in that reach of Fanno Creek without the drainage improvements called for in the Plan. Thus, without the improvements called for in the Plan, the projected 100-year flood elevation will exceed the floor elevation of Petitioner's store.

Petitioner likewise receives considerable benefits from the pathway. Contrary to Petitioner's claim, the City is not requiring her to dedicate a fee simple for the construction of the pathway. *See* notes 14 & 16, *supra*. The City will build, at public expense, the path through the easement called for in the condition. *Id.* Thus, Petitioner will obtain significant advantages from the path built at public expense. The path provides a direct pedestrian connection to Petitioner's store from the downtown's employment center. The path also will reduce traffic congestion, improving street access to her store for potential customers. *See* Nelson, *supra*, at 11. In addition, because Petitioner's greatly-expanded retail store can be used in the future for virtually any retail business -- especially after the second phase of the development -- the value added by the pathway is not restricted to that added to a plumbing store,[31] but is likely to

[31] Petitioner sets forth a red herring when she implies that people only buy bath tubs at plumbing/hardware stores. A bolt is at least as important a hardware item as a bath tub, and can easily be carried on a bicycle. So while a plumbing/hardware store may not generate as many bike trips as a video store, it is easy to see that the path will have utilitarian value to Petitioner's customers. *See* Nelson, *supra*, at 22 ("Even when an argument can be made that a particular tenant has no use for bicycle traffic this relationship is reasonable since tenants come and go but commercial

increase in the future when, as the City's planning studies predict, *see* App A38, residents increasingly rely on bicycles and walking for utilitarian trips.

Finally, the condition benefits Petitioner in another substantial way. The City is allowing her at her request to use the flood plain dedication as a full credit against the landscaping requirement that it would otherwise impose. The landscaping will be installed and maintained at public expense. Pet. Cert. G44, 45, Condition 4; *see* note 15, *supra*, and accompanying text. This credit allows use of approximately an additional 7,000 square feet of the site's buildable area for building and parking purposes that would otherwise be committed to open space. "[T]hese rights . . . undoubtedly mitigate whatever financial burdens the law has imposed on [Petitioner] and, for that reason, are to be taken into account in considering the impact of regulation." *Penn Central*, 438 U.S. at 137 (citation omitted).

For similar reasons, Petitioner cannot seriously contend that the City's easement condition is somehow unduly burdensome on the theory that it interferes with her "distinct investment-backed expectations." *Penn Central*, 438 U.S. at 127. Just as governmental interests differ based on the location and use of particular parcels, so must the property owner's expectation about how the government is likely to regulate his or her property. Just as the government should expect that a beach front homeowner holds privacy as a critical interest, it should also expect that a downtown store owner seeks increased customer access. Indeed, access, via all modes of transportation, is likely the determining factor in maintaining the viability of a central business district. Any argument by Petitioner, therefore, that she made her property investment based on the expectation that the City

activity *per se* is dependent on all forms of traffic.").

would restrict public access and obstruct drainage would be ludicrous. Her argument here that she did not expect the City to enhance drainage and accessibility is hardly less so.

Furthermore, an examination of the condition "in light of the whole of our legal tradition," *Lucas*, 112 S. Ct. at 2903 (opinion of Kennedy, J., concurring in the judgment), underscores the reasonableness of the City's actions in this case, by revealing its roots in settled ideas about valid land use regulation. Those ideas find early expression in the purposes of the Standard State Zoning Enabling Act: "to lessen congestion in the streets; . . . to promote health and the general welfare; . . . to prevent the overcrowding of land; . . . and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements." Standard State Zoning Enabling Act (U.S. Department of Commerce, 1926), *reprinted in* 5 Robert M. Anderson, American Law of Zoning 3d at § 32.01 (1986).[32]

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[32] Exactions linked to the development of land are also not a new innovation. Subdivision dedications have been required since at least 1895. *See* John C. Vance, *Exaction of Right of Way by Exercise of Police Power*, in 2 Ross D. Netherton, Selected Studies in Highway Law 936-N227 at 936-N232 (1988). Indeed, cities have been requiring landowners to build and maintain sidewalks for over a century. *See* Nelson, *supra*, at 7. Thus, "[e]xactions are now firmly entrenched as a legitimate means of exercising community growth control." Vance, *supra*, at 936-N246; *see generally* R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 Law & Contemp. Probs. 5, 25 (1987). During recent decades the use of exactions upon development of all sorts has become common and, therefore, more expected. *See generally*, Vance, *supra*, at 936-N230 n.5 (noting that "although the significant case law in the field has developed almost exclusively around interpretation of subdivision control regulations, the use of exactions has been extended to such other activities as: rezoning, grant of variance, site plan approval, annexation, grant of building permit, erection of apartment house complex,

The City's condition in this case also finds it roots in settled state nuisance law. In *Amphitheaters, Inc. v. Portland Meadows*, 184 Or. 336, 345, 198 P.2d 847, 851 (1948), the Oregon Supreme Court held that flooding of another's land is among the acts which are "easily recognizable" as constituting a common law nuisance. Indeed, the City may have had an affirmative duty to prevent flooding. *See Levene v. City of Salem*, 191 Or. 182, 229 P.2d 255 (1951) (upholding municipality's liability under private nuisance theory for flooding caused by the overburdening of a drainage system). Petitioner had more than ample reason, therefore, to expect the City to take actions necessary to mitigate the increased flood effects her greatly expanded project would cause. Thus, far from frustrating Petitioner's "distinct investment-backed expectations," the City's actions in this case evidence regulation of land that has long been and still remains a commonly accepted response to intensified uses in central commercial districts.

Finally, contrary to Petitioner's claim, the condition that the City imposed in this case is carefully tailored to Petitioner's circumstances in many significant respects.[33] To

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and conversion to condominiums.") (citations omitted).

[33] In her brief to this Court Petitioner claims for the first time in this litigation that the City's condition is invalid because she is already subject to system development charges and, therefore, the condition amounts to unfair double charging. *See* Pet. Br. n.2. Those development charges, however, have absolutely no bearing on the validity of the City's condition. Most fundamentally, they are not part of the City's decision, but are imposed by different governmental entities and are used to fund governmental programs at the discretion of those entities. Washington County, not the City, imposes the traffic impact tax, and the surface water management charges for water quality are imposed by the Unified Sewage Agency (USA), which is created and operated pursuant to ORS Chapter 451. Those systems development charges are imposed on all development

be sure, the City's easement exaction policy turns in the first instance on a threshold inquiry, in particular, whether the location of the development was sufficiently close to the floodplain and the size of the development sufficiently large to trigger expected impacts of the magnitude to contribute substantially to storm drainage and traffic congestion problems. Based on its prior studies and planning documents, the City of Tigard Development Code established, through requiring a major modification of existing development to undergo site development review, a threshold for determining when a development's impacts were sufficient to justify this type of exaction. Petitioner, in turn, passed that threshold when she proposed a major modification of her commercial property in the central business district next to the floodplain: a classification that she has never challenged.

Contrary to Petitioner's apparent assumption, the Takings Clause does not forbid a municipality from imposing an easement condition based on a threshold analysis rather than on a mathematical quantification of the precise impacts of the proposed development. For reasons similar to those expressed by the Court in rejecting an analogous takings challenge brought against flat uniform fees, *see Sperry*, 110 S. Ct. at 394 (citing *Massachusetts v. United States*, 435 U.S. 444, 463 n.19 (1978)), a municipality does not offend the Takings Clause when it uses a threshold analysis to apply the same easement exaction on a large number of parties based on the expected impacts of their respective major developments. The particular effects of each major development may differ to some degree. But this Court has

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county-wide and fund only projects that the County and USA identify as worthy. In contrast, the exactions challenged in this litigation are imposed by the City, not the County, and are imposed in connection with the development approval to provide for improvements pursuant to City law.

wisely declined to "impose a requirement that the Government 'give weight to every factor affecting'" the appropriate level of an exaction. *Sperry*, 110 S. Ct. at 394 (quoting *Massachusetts v. United States*, 435 U.S. at 468). "There is no [such] exacting requirement under the Just Compensation Clause." *Sperry*, 110 S. Ct. at 394 n.7; see page 30, *supra*.

In this case the City gave Petitioner ample opportunity to avoid or adjust CDC requirements based upon the project's impact. Consistent with the City's planning documents, the City designed its general rule of limited dedications to allocate direct and indirect benefits and costs fairly. Petitioner is here on a variance application that allows for case-by-case adjustments to the general rule and the type of dedication condition imposed on Petitioner reflected the City's effort to balance the benefits and burdens of both Petitioner's development and the City's condition.[34]

The City, moreover, did in fact tailor this condition to Petitioner's circumstances. The City found that no structural

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[34] Condition No. 1 of Petitioner's approval only requires the dedication of an easement. Pet. Cert. G43, G44. Had Petitioner provided evidence of the impacts which she perceives to be generated by her development, the mechanism is available within the CDC to further tailor the extent of the exactions. In the absence of any evidence from Petitioner, the City relied upon its storm drainage master plan and its prior transportation planning, which conclude that expansion of commercial enterprises will increase storm water runoff and congestion. Petitioner's attempt to exempt herself from the dedication requirements fell woefully short. Her entire presentation concerning the five applicable variance standards consists of a rambling one-half page assertion that the City's condition was unconstitutional. App E4. Totally absent in her presentation was any factual analysis of the impact of her development that could have led the City to conclude that the exactions being requested were totally out of proportion to the impacts of the proposed development. Pet. Cert. G22, G23.

improvements were required of this development, though the Drainage Plan calls for such improvements along the frontage of this property with Fanno Creek. Pet. Cert. G13, R-Doc. No. F 7-4, Table 8-2. The City required only the dedication of an easement to provide the public with the access necessary to construct and maintain drainage improvements, all at public expense. Pet. Cert. G40, 41. The City concluded that such an approach would address the development's impacts, while affecting only unbuildable property of little value located in the floodplain. Pet. Cert. G39. The City thereby tailored the condition by balancing the relative benefits and burdens of the proposed commercial development.

The City adopted a similar approach with regard to the bicycle/pedestrian path. The City's comprehensive plan identified congestion in its downtown as a particular problem, and it found that congestion on Main Street, located next to Petitioner's property, was so problematic that it restricted emergency response. App A31. Petitioner does not dispute the evidence in the record that her expansion will make that congestion worse. But, rather than simply denying Petitioner's application on that basis, the City was willing to risk that innovative transportation approaches will mitigate the impact. The path will be an effective "travel demand management" solution that will mitigate the increased congestion caused by Petitioner's store. *See* Amicus Br. Rails-to-Trails Conservancy.

The City tailored the precise nature of the exaction that it sought from Petitioner for the bicycle/pedestrian pathway. CDC § 18.164.110 regulates the extent of path dedication and construction requirements for individual projects. It allows a range of requirements, depending on the particular benefit the development will derive from the path. The condition here requires only the dedication of an easement

for pathway purposes. The City decided not to require Petitioner herself to build a pathway along the easement,[35] but instead to do so at public expense.

In summary, the condition to Petitioner's major development was reasonably related in character and degree to the actual impacts of that development. It thereby struck a fair balance between Petitioner's interests and her responsibilities to the public. Thus, the condition did not offend the purposes of the Takings Clause in that it neither singled Petitioner out nor was it the result of subterfuge.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted.

Timothy V. Ramis*
James M. Coleman
G. Frank Hammond
Ty K. Wyman

O'DONNELL, RAMIS,
CREW & CORRIGAN
1727 NW Hoyt Street
Portland, OR 97209
Telephone: (503) 222-4402
Counsel for Respondent
**Counsel of Record*

Richard J. Lazarus
Washington University
School of Law
One Brookings Drive
St. Louis, MO 63130
Of Counsel

February 17, 1994

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[35] Petitioner's claim that the City is requiring her to build the path is incorrect. *See* note 14, *supra*.

APPENDIX A

EXCERPTS FROM THE CITY OF TIGARD'S COMPREHENSIVE PLAN

* * *

[I-192] III. STORM DRAINAGE AND WASTEWATER MANAGEMENT

Tigard's Comprehensive Plan recognizes the importance of drainage management and notes the impact of improper management of drainageways and watercourses (flooding, pollution and loss of recreational areas and natural habitats). Thus, the following objectives and policies are contained in the "Environmental Design and Open Space Plan," adopted in 1977.

The Federal Environmental Protection Agency has established requirements which must be met prior to qualifying for funds to construct wastewater management facilities. One of the requirements is the preparation of an Areawide Plan which addresses wastewater point sources and non-point sources. The Metropolitan Service District has prepared an Areawide Plan called No. "208" Plan which addresses facilities and storm water, sanitary sewage, and measures to reduce "storm water runoff."

The major drainage problem in Tigard is the storm water runoff throughout the area. This problem results from the increase in impervious land surfaces that can alter the quantity and quality of runoff from the land. Much of the deficiencies that currently exist within the Tigard area are due to the lack of adequate storm drainage facilities in many areas and stream bank overflow along the Fanno Creek basin.

[I-193] The primary water quantity problem is overbank flooding that occurs when storm water quantity exceeds channel capacity. Further, pollutants transported by storm water runoff from nonpoint sources are significant contributors to the degradation of water quality in the Tigard area. An upper Fanno Creek study found that during several runoff events, the pollutant concentrations measured in the stream exceeds those found in effluent from secondary sewage treatment plants. Urban nonpoint pollution results primarily from the accumulation and transport of contaminated material on paved surfaces such as streets and parking lots. The automobile is a major contributor to many pollutants to these source areas.

In 1981, CH_2M Hill, Inc., developed a "Master Drainage Plan" for the City. This plan incorporates existing procedures and standards regarding subdivision and storm water detention with the recommended changes to the existing floodplain management program. The study also lists numerous recommendations and solutions that would increase the flow efficiently [sic] of the Fanno Creek floodway. For example it is stated that numerous bridges, i.e., the Tigard Street and North Dakota Street bridges, are currently below flood elevation and these bridges substantially decrease the flow of water along Fanno Creek. It is suggested in the study that raising the bridge deck would alleviate much requirements and costs for development of an effective drainage management system. Although many of these improvements are beyond the City's financial means at this time, the City is in the process of incorporating these items into the capital improvements program.

ORDINANCES:

An ordinance has been adopted by City Council relevant to drainage management and the protection of environmentally sensitive lands.

> Ordinance No. 83-09 – The Sensitive Lands Chapter (18.84) of the City zoning ordinance is the most important legislation regarding drainage management. The purpose of the chapter is as follows:
>
> A. Sensitive lands are lands potentially unsuitable for development because of their location within the 100-year floodplain, within natural drainageway, on steep slopes or on unstable ground;
>
> B. Sensitive land areas are designated as such to protect the public health, safety and welfare of the community through the regulation of these sensitive land areas;
>
> C. The regulations of this chapter are intended to implement the Comprehensive Plan and the Federal Emergency Management Agency's flood insurance program, to help preserve natural sensitive land areas from encroaching uses and to maintain the September 1981 zero-foot rise floodway elevation; and
>
> D. City actions under this chapter will recognize the rights of riparian owners to be free to act on the part of the City, its commissions, representatives and agents, and landowners and occupiers.

[I-194] The existing plans and regulations of the City and Washington County express a need for common understanding of drainage problems

and a uniform approach to their solution, both inside and outside of the city limits. Although, the existing policies and regulations provide an excellent basis for drainage planning, the City needs to supplement them with additional regulatory procedures and standards, particularly in the areas of subdivision regulations and storm water detention.

* * *

[I-221] II. TRANSPORTATION ASSUMPTIONS

In any planning effort, there are underlying assumptions that assist in the formulation of policies and implementing strategies.

In regards to transportation, these assumptions include:

1. Because of the diverse number of vehicle trips per day that are taken by Tigard residents, the automobile will remain the most dominant source of transportation.
2. Many of the primary (collector streets) transportation corridors within the City of Tigard are currently developed below City standards, and thus inadequately service both current and future traffic demands.
3. Within the City of Tigard there are numerous employers with over fifty (50) employees and not all of the employees of these firms reside within the Tigard City limits.
4. People will become increasingly more energy conscious because of continuing high fuel prices. This factor may increase public transit ridership. It is assumed that most of

this transit travel will be from Tigard to Portland's core area and not an increase in inter-Tigard trips.

5. Bicycle and pedestrian pathway systems will result in some reduction of automobile trips within the community. These modes of travel could replace short vehicle trips for shopping purposes.
6. Transportation planning for the City of Tigard must be conducted in cooperation with other local and regional jurisdictions e.g., Washington County and the Metropolitan Service District (MSD).
7. Social and environmental concerns will continue to influence transportation routing and development.
8. Most of the population and employment growth during the planning period (1980-2000) will occur in the suburban areas rather that [sic] the Portland urban core; thus putting more pressures on the suburban transportation systems. It may also have the effect of creating longer trips, i.e., a person lives in Tigard and commutes to work in Portland.

[I-222] Within the remaining sections of this report, each of these assumptions will be addressed, either through the available data or through policies and implementation strategies. It is important to note that transportation planning problems cannot be solved within just the Tigard area. In the Tigard area a safe, convenient and economic transportation plan will only be achieved through a coordinated effort of other state, regional and local agencies. At a minimum

these other agencies include: Washington County, the Metropolitan Service District, the Oregon Department of Transportation, and adjacent cities in the southwest area of the Portland metropolitan area.

* * *

[I-256] VIII. PEDESTRIAN AND BICYCLE WAYS

Although auto and transit are the major modes of transportation, walking is one mode used considerably for short trips. Bicycle transportation is primarily used for recreational trips. Presently, there are approximately 40 miles of sidewalk and/or bike paths in Tigard. Most of these paths or sidewalks are in new subdivisions and in the vicinity of schools.

[I-257] Given the suburban nature of Tigard, recreational aspects of the pedestrian and bikeway will be a predominant concern of Tigard residents. Pedestrian pathways are combined with the discussion of bikeways because of similar needs for legislation, funding and purposes of these recreational oriented pathways.

The recreational benefits of a carefully planned system of bicycle and pedestrian pathways in Tigard are numerous. Areas along Fanno Creek which have been identified as having natural significance have been made more accessible to Tigard residents by the pathway system. Park and recreational areas accessibility has also been improved by providing pathways along streets linking parks, schools and shopping areas.

In 1974, the City Council adopted a Comprehensive Pedestrian/Bicycle Pathway Plan which describes the

major generator of bike/pedestrian usage and the phasing priorities for completion of the plan. The open space/greenway concept has provided excellent opportunities for providing access to many areas of the City.

Several benefits of bicycle and pedestrian pathway usage have long been acknowledged as benefiting the community through:

1. Reduction of air pollution sources;
2. Reduction of non-renewable energy consumption;
3. Reduction of auto related congestion;
4. Reduction of noise; and
5. Physical and social benefits to the individual.

In addition, however, there are numerous identified problems related to pedestrian and bicycle usage.

These problems include:

1. Personal safety, competition with auto traffic;
2. Bicycle security;
3. Time efficiency;
4. Inclement weather, and/pedestrian pathway;
5. Lack of connecting bike/pedestrian pathway facilities between jurisdictions; and
6. Potential crime and policing bikeways.

A. PLANNING RELATED EFFORTS

The Portland area is not lacking for trail and bikeway paths and the connection of pathways between adjacent communities remains a high potential.

Washington County adopted a Bicycle Pedestrian Pathway Master Plan in 1975. The Plan, however, has never been fully implemented. The County is now in the process of updating its 1975 plan. Recognizing the limitations of the present road system to offer safe bicycle use and the extensive growth that has occurred in recent years, the Public Works Department has begun updating the City's pedestrian/bicycle plan to reflect where the best opportunities for bicycle use [I-258] are available. A major obstacle towards developing an extensive bicycle/pedestrian network is lack of public funds for such an effort. Opportunities, however, do exist in the developing areas of the County where unused right-of-way is available or where right-of-way could be acquired in conjunction with new developments or road improvements.

To implement its adopted plan, the City of Tigard has relied on its street overlay and widening program, and adjacent development. These processes have allowed for the completion of an additional 3.7 miles of bike/pedestrian pathways in 1982. It is anticipated that as more of the streets in Tigard come under the City's jurisdiction, additional bike/pedestrian pathway links will be completed.

* * *

[I-266] APPENDIX III

TIGARD AREA
COMPREHENSIVE PEDESTRIAN-BICYCLE
PATHWAY PLAN

Prepared by
Tigard Area Pedestrian-Bicycle
Pathway Committee

Adopted March 25, 1974

[I-267] The following is a short report regarding the subject plan, written so that the public might better understand the thinking and rationale that is embodied within the plan.

Committee History

Briefly, the Washington County Commissioners chose to spend their 1% gasoline tax bicycle-pedestrian pathway money on areas close to schools. In order to determine the location of these proposed rates [sic], the County requested the Tigard School District to make a priority listing of desired pathways on county roads within the district. The school district assigned its Safety and Transportation Coordinator, Bill Bieker, to the project and a list was compiled. As a result of this work the school district and the management of the City of Tigard felt a comprehensive pedestrian-bicycle plan for the Tigard area was needed. Bill Bieker from the school district and Steve Telfer, City Manager, agreed to establish a committee for the purpose of developing a comprehensive pathway plan and members were selected from each elementary school attendance area. Others who have assisted the committee include Nick Hiebert, Tigard Department of

Public Works; Wink Brooks, Tigard Planning Director; and Steve Oppenheim, Director of Bikeway Planning, CRAG; Norm Hartman, a Tigard Planning Commissioner, is *also* a member of our committee.

Criteria for Path Selection

In determining where routes were to be located, the committee chose the following criteria:

1. To reduce hazards that exist on present roads;
2. To provide safe access to schools, recreation areas and major shopping areas;
3. To develop the possibility of walking to school rather than riding, thereby eliminating some school bus transportation;
4. To serve the greatest number of potential users;
5. To provide safety for walkers and bike riders to summer activities which require transportation by auto; *and*
6. [I-268] To establish pedestrian access to mass transportation.

Routes considered were only within the Tigard School District boundaries. The City Planning Staff has recommended additional routes to complete our Plan and create a total bicycle-pedestrian pathway system within the Tigard planning area. We have reviewed and approved the location and phasing of routes proposed by the staff. The City Staff's criteria for route selection were as follows:

1. To reflect proposed regional pedestrian-bicycle routing through the Tigard area;

2. To reflect the Greenway System proposed in the *Tigard Community Plan;*
3. To provide better pedestrian-bicycle access around and through certain neighborhoods;
4. To reflect recommendations embodied in the Ash Avenue-Downtown Neighborhood Plan; *and*
5. To create better access to downtown Tigard from the Greenburg neighborhood.

The described route selection criteria were measured against a relationship to major pedestrian and bicycle traffic generators. These can be grouped into four general categories: schools, recreation points, shopping and public buildings. There [sic] are described as follows:

Schools:

(Elementary)	(Junior High)	(High School)
Durham	Thomas R. Fowler	Tigard Senior High
Metzger	Tuality	
Phil Lewis		
St. Anthony's		
Templeton		
Charles F. Tigard		
Tualatin		

Recreation Points:

- Cook Park
- School tennis courts
- Jack Park
- Metzger Park
- Tigard Swim Center
- Tuality tennis courts
- Tualatin Park
- Woodard Park

Shopping:

- Canterbury Square
- Downtown Tigard
- Downtown Tualatin
- Fred Meyer
- K-Mart
- King City
- Tigard Plaza
- Washington Square

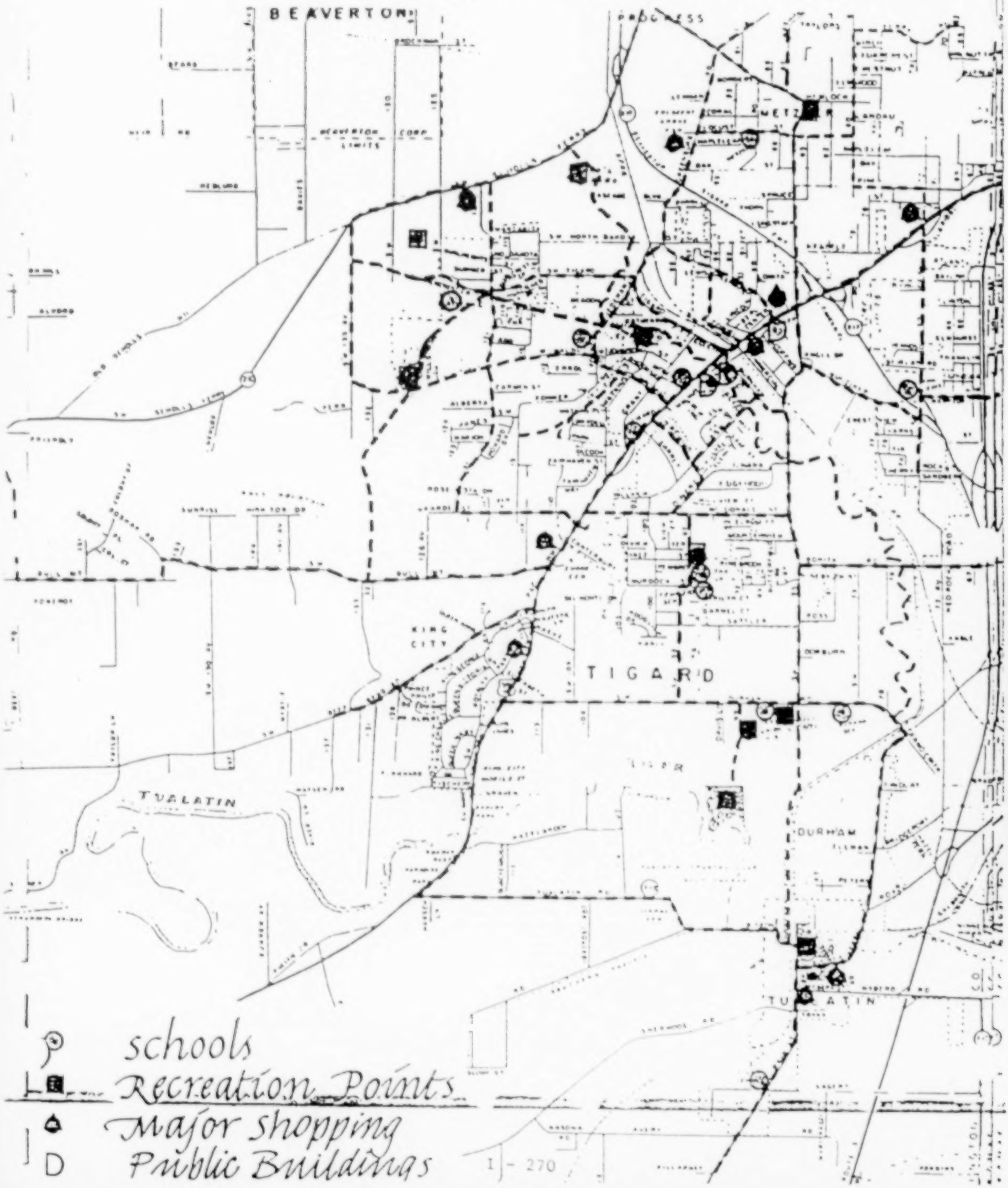
[I-269] Public Buildings:
Library
Old Fowler Jr. High (tentative community center)
Tigard Post Office
Tualatin Post Office

School District 23J school population distribution maps were also utilized in routing the pathways.

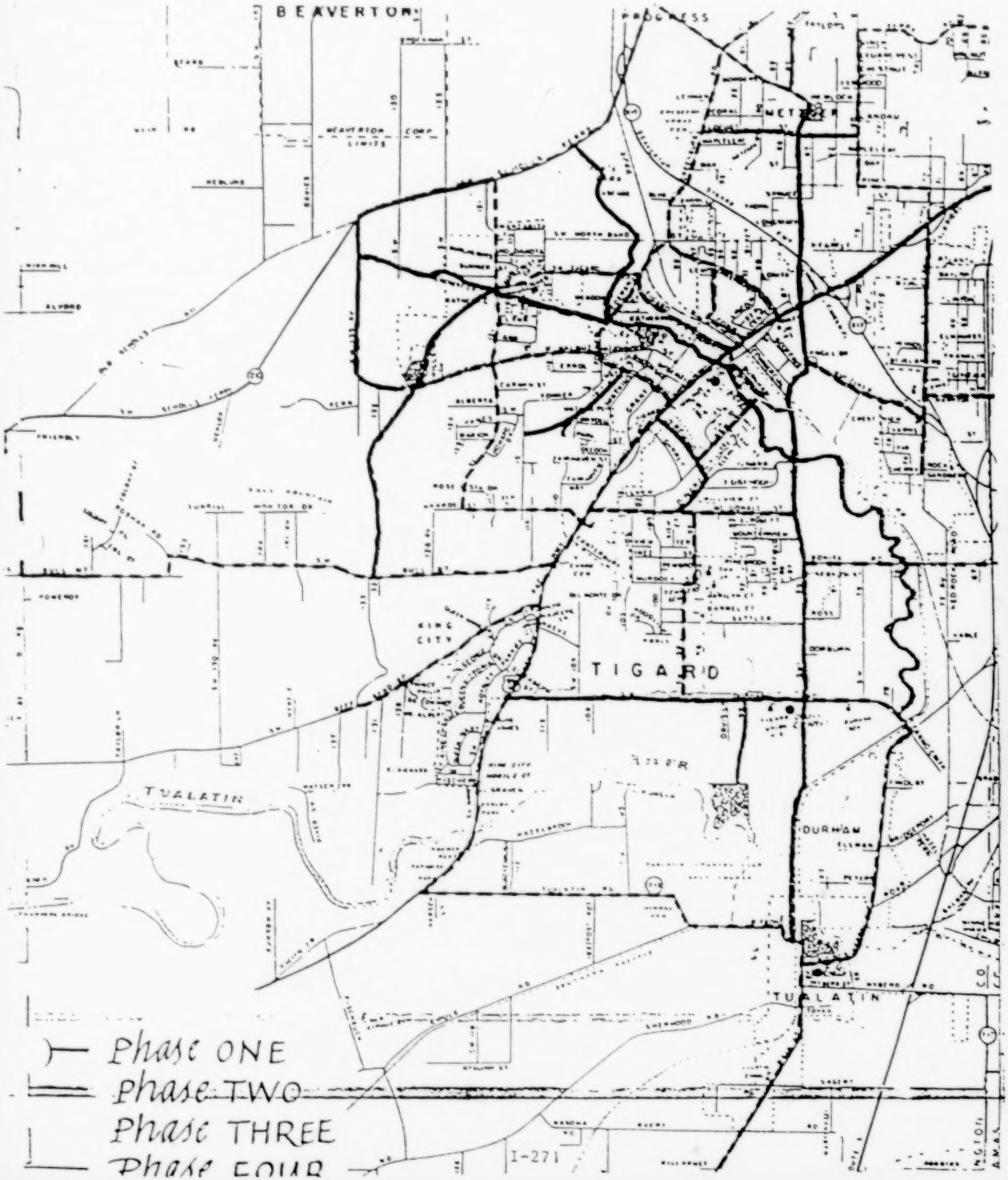
Recommended Development Phases

The Committee has prioritized both the Committee's own route selections and the Planning staff's selections on the basis of public safety. It should be noted that the Committee does not feel that the proposed routing will be implemented in the exact order recommended, but rather some routes will be constructed out of phase and in conjunction with street and park projects. The Committee does recommend the described phasing as project priorities for any City initiated pedestrian-bicycle pathway program.

Major Generators



Priorities



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[II-11] 3. NATURAL FEATURES AND OPEN SPACE

This chapter addresses a broad range of topics all having to do with the natural resources located within the Tigard Urban Planning Area. This chapter reflects the concerns expressed in several of the Statewide Planning Goals including:

> Goal #3 – Agricultural Lands; Goal #4 – Forest Land; Goal #5 – Open Spaces; Scenic and Historic Areas and Natural Resources; Goal #7 – Areas subject to Natural Disasters and Hazards; and Goal #8 – Recreational Needs.

The natural environments within the planning area offer many opportunities for a unique and healthy urban development. Those environments, when viewed as a series of systems rather than isolated features, will provide Tigard with those elements necessary for a healthy place in which to live, work and play. Floodplain greenways, for example, can provide the community with an excellent system of open space links between neighborhoods and services, in addition to providing a relatively inexpensive system for storm water runoff. It is to the community's benefit that consideration be given to both the opportunities and the limitations of the various environments within the planning area.

The natural environments included within the planning area all have their own respective limitations with regard to urbanization. Development pressure upon lands with such limitations can have profound effects on the environment. Erosion of steep slopes caused by inappropriate

development, for instance, does not occur as an isolated incident. Soil type, permeability, vegetation and drainage all play major roles in and are effected by development. Likewise, the effects of inappropriate development located within the floodplain areas could have adverse effects on properties both up and down stream from the development site. The social, cultural and economic values of such resource lands could be reduced by the effects of urban development nearby. The limitations of the various environments should be considered in reviewing new development within the planning area.

The recognition of the natural environment in the planning area and the development of findings and policies which address the characteristics of the environment are extremely important elements in the Comprehensive Plan. The purpose of this chapter is to define the parameters of the various natural environments in the planning area and to identify the limitations and opportunities inherent in those environments.

Additional information on this topic is available in the "Comprehensive Plan Report: Natural Features and Open Spaces."

3.1 PHYSICAL LIMITATIONS, NATURAL HAZARDS AND WETLANDS

Findings

- The physical features which form the make-up of any piece of land have a direct relationship to the type and density of development which can be accommodated on that property (carrying capacity). Combinations such as steep slopes and unstable soils create severe development constraints. Excessive development in

such physically limited areas greatly increases the potential severity of landslide, earthquake damage, flooding, etc.

- Many portions of the floodplain area contain natural aspects such as significant vegetation, wildlife, and scenic areas, and are valuable for open space and recreation.

- [II-12]Vegetation serves an essential element [sic] in runoff and erosion control, as well as for the protection and natural habitation of wildlife. Nonetheless, it is too often removed and replaced by buildings or impervious surfaces.

- Due to the general nature of soils and geologic mapping, site specific analysis is often necessary to determine the presence of geologic hazards and the severity of soil problems which are constraints to development. Such geologic hazards exist when certain combinations of slope, soil, [and] bedrock and moisture render land unstable.

- Earthflow and slump areas exist in hilly sections of the planning area and are associated with poor drainage, shallow subsurface flow on [sic] ground water and springs, and high susceptibility to erosion. Earthflow and slump occurrences can destroy roads and buildings, and adversely affect water quality. Mass movement has not resulted in any major loss of life or property thus far, because little in the way of urban development exists on land with serious problems.

- Increased runoff and sedimentation from poorly developed hillsides can require increased public expenditures for flood and erosion control and storm water management.

- The City of Tigard had adopted a "Hillside Development Provision" within the Sensitive Lands ordinance

which requires additional review of those developments.

- The City of Tigard requires new developments to have a storm water runoff plan to ensure against adverse effects such as erosion and sediment.

POLICY

3.1.1 THE CITY SHALL NOT ALLOW DEVELOPMENT IN AREAS HAVING THE FOLLOWING DEVELOPMENT LIMITATIONS EXCEPT WHERE IT CAN BE SHOWN THAT ESTABLISHED AND PROVEN ENGINEERING TECHNIQUES RELATED TO A SPECIFIC SITE PLAN WILL MAKE THE AREA SUITABLE FOR THE PROPOSED DEVELOPMENT. (NOTE: THIS POLICY DOES NOT APPLY TO LANDS DESIGNATED AS SIGNIFICANT WETLANDS ON THE FLOODPLAIN AND WETLANDS MAP.)

a. AREAS MEETING THE DEFINITION OF WETLANDS UNDER CHAPTER 18.26 OF THE COMMUNITY DEVELOPMENT CODE;

b. AREAS HAVING A SEVERE SOIL EROSION POTENTIAL;

c. AREAS SUBJECT TO SLUMPING, EARTH SLIDES OR MOVEMENT;

d. AREAS HAVING SLOPES IN EXCESS OF 25%; OR

e. AREAS HAVING SEVERE WEAK FOUNDATION SOILS.

(Rev. Ord. 85-13; Ord. 84-36)

[II-13] IMPLEMENTATION STRATEGIES

1. Areas having physical limitations (poor drainage, seasonal flooding, unstable ground) may be subject to policy 3.1.1. of the Comprehensive Plan.

2. The City shall revise the Sensitive Lands section of the Tigard Community Development Code to identify the standards and define those areas having distinct constraints and limitations.

3. The City shall cooperate with other agencies to help identify these areas.

4. The City of Tigard shall provide in the Community Development Code a provision for the City to require site specific soil surveys and geologic studies where potential hazards are identified based upon available geologic and soils evidence. When natural hazards are identified, the City will require that special design considerations and construction measures be taken to offset the soil and geologic constraints present in order to protect life and property, and to protect environmentally sensitive areas.

5. The Community Development Code shall not permit developments to be planned or located in known areas of natural disasters and hazards without appropriate safeguards. (Rev. Ord. 85-13)

3.2 FLOODPLAINS

Findings

- The objective of the City is to use the detailed information gathered on floodplains from the U.S. Army Corps of Engineers, and develop policies to:

  1. Control development, as to not adversely affect the floodplain and floodway areas;

2. Minimize the runoff-erosion impact of development on the surrounding area and downstream properties; and

3. Emphasize the retention of a vegetative buffer along streams and drainageways, to reduce runoff and flood damage and provide erosion and siltation control.

- In addition, there is the issue of the cumulative effect of development upstream of Tigard. Flood levels in Tigard will be substantially determined by the controls exercised over development outside the plan area, as well as inside Tigard's Planning Area.

- The Fanno Creek drainage system includes numerous small water courses. The integrity of these natural drainageways is intrinsically connected to the systems [sic] capacity to absorb excessive runoff and on subsequent flood levels. Often, however, water courses are altered to provide more usable land. If alterations are done incorrectly, impacts can be adverse. If the impacts are adverse, they can be detrimental to the entire drainage system, i.e., the storage capacity of the water course is lessened and flooding occurs. In fact, in lower reaches, it is beneficial to have more water move through at a faster rate.

- [II-14] Besides the basic need to control development in flood prone areas, it was found that public knowledge of flood plain hazards was lacking. Many of the obstructions previously placed in the flood plain were the result of a lack of information and adequate runoff predictions about potential flooding problems. These obstructions (e.g., Main Street Bridge) hinder the flow of high water and tend to increase flood levels.

- Proper administration of the floodplain areas relies heavily upon the availability of adequate information upon which to assess the environmental impacts of a

project. The development, which creates the need, should be responsible for providing the City with the necessary data for making sound decisions. The burden is on the applicant to prove that a project will not adversely affect the environment or create undue future liabilities for the City.

- The City of Tigard, with assistance from the U.S. Army Corps of Engineers, has established an area designated within the 100-year floodplain.

- The City of Tigard has been accepted as an eligible area for the National Flood Insurance Program, and as a result flood insurance will be available to property owners in flood prone areas. The federal program, however, requires the City to adopt an ordinance which meets certain federal standards.

- The City of Tigard currently has ordinances, policies and standards within the Tigard Community Development Code which provide adequate controls for development within floodplain areas.

- According to the 1981 Drainage Master Plan Study conducted by CH_2M Hill for the City, flood levels of two to four feet higher than the existing 100-year floodplain may be expected if no corrective measures are taken.

- To protect the intent of the City's Greenway policy, the Greenway is defined with the same physical boundaries as the 100-year floodplain boundary. (Rev. Ord. 85-13)

POLICIES

3.2.1 THE CITY SHALL PROHIBIT ANY LAND FROM [sic] ALTERATIONS OR DEVELOPMENTS IN

THE 100-YEAR FLOODPLAIN WHICH WOULD RESULT IN ANY RISE IN ELEVATION OF THE 100-YEAR FLOODPLAIN.

3.2.2 THE CITY SHALL:

a. PROHIBIT LAND FORM ALTERATIONS AND DEVELOPMENT IN THE FLOODWAY*, EXCEPT ALTERATIONS MAY BE ALLOWED WHICH PRESERVE OR ENHANCE THE FUNCTION AND MAINTENANCE OF THE ZERO-FOOT RISE FLOODWAY*; AND

b. ALLOW LAND FORM ALTERATIONS OR DEVELOPMENT IN THE FLOODPLAIN* OUTSIDE THE ZERO-FOOT RISE FLOODWAY* WHICH PRESERVE OR ENHANCE THE FUNCTION OF THE ZERO-FOOT RISE FLOODWAY* PROVIDED:

1. THE LAND FORM ALTERATION AND/OR DEVELOPMENT IS IN AN AREA DESIGNATED COMMERCIAL OR INDUSTRIAL ON THE COMPREHENSIVE PLAN LAND USE MAP, AND FACTORS SET FORTH IN POLICY 3.2.3 CAN BE SATISFIED; OR

2. [II-15] THE LAND FORM ALTERATION AND/OR DEVELOPMENT IS ASSOCIATED WITH COMMUNITY RECREATION USES, UTILITIES, OR PUBIC SUPPORT FACILITIES AS DEFINED IN CHAPTER 18.42 OF THE COMMUNITY DEVELOPMENT CODE AND THE FACTORS SET FORTH IN POLICY 3.2.3 CAN BE SATISFIED.

3.2.3 WHERE LAND FORM ALTERATIONS AND DEVELOPMENT ARE ALLOWED WITHIN THE

100-YEAR FLOODPLAIN* OUTSIDE THE ZERO-FOOT RISE FLOODWAY*, THE CITY SHALL REQUIRE:

a. THE STREAMFLOW CAPACITY OF THE ZERO-FOOT RISE FLOODWAY* BE MAINTAINED;

b. ENGINEERED DRAWINGS AND/OR DOCUMENTATION SHOWING THAT THERE WILL BE NO DETRIMENTAL UPSTREAM OR DOWNSTREAM EFFECTS IN THE FLOODPLAIN* AREA, AND THAT THE CRITERIA SET FORTH IN THE SENSITIVE LANDS SECTION OF THE CODE HAVE BEEN MET (See FIS September 1981);

c. A BUFFER, EITHER EXISTING OR PLANTED, ON THE COMMERCIAL OR INDUSTRIAL LAND ABUTTING RESIDENTIAL LAND WHICH ADEQUATELY SCREENS THE DEVELOPMENT FROM VIEW BY THE ADJOINING RESIDENTIAL LAND, AND WHICH IS OF SUFFICIENT WIDTH TO BE NOISE ATTENUATING; AND

d. THE DEDICATION OF OPEN LAND AREA FOR GREENWAY ADJOINING THE FLOODPLAIN* INCLUDING PORTIONS AT A SUITABLE ELEVATION FOR THE CONSTRUCTION OF A PEDESTRIAN/BICYCLE PATHWAY WITHIN THE FLOODPLAIN* IN ACCORDANCE WITH THE ADOPTED PEDESTRIAN BICYCLE PATHWAY PLAN.

3.2.4 THE CITY SHALL PROHIBIT DEVELOPMENT WITHIN AREAS DESIGNATED AS SIGNIFICANT WETLANDS ON THE FLOODPLAIN AND WETLANDS MAP. NO DEVELOPMENT SHALL OCCUR ON PROPERTY ADJACENT TO AREAS

DESIGNATED AS SIGNIFICANT WETLANDS ON THE FLOODPLAIN AND WETLANDS MAP WITHIN TWENTY FIVE (25) FEET OF THE DESIGNATED WETLANDS AREA. DEVELOPMENT ON PROPERTY ADJACENT TO SIGNIFICANT WETLANDS SHALL BE ALLOWED UNDER THE PLANNED DEVELOPMENT SECTION OF THE CODE.

3.2.4 THE CITY SHALL REQUIRE THE DEDICATION OF ALL UNDEVELOPED LAND WITHIN THE 100-YEAR FLOODPLAIN PLUS SUFFICIENT OPEN LAND FOR GREENWAY PURPOSES SPECIFICALLY IDENTIFIED FOR RECREATION WITHIN THE PLAN.

• The Floodplain and Floodway, as defined by the Flood Insurance Study for the City of Tigard dated September 1, 1981.

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[II-40] 7. PUBLIC FACILITIES AND SERVICE

The continued increased growth in population for the Tigard Planning area will require a corresponding expansion of public facilities and services. Policies concerning the manner in which public facilities are expanded can help direct the location and intensity of future housing, commercial and industrial development.

Statewide Planning Goal #11 specifically speaks to this concern. It directs jurisdictions

> "to plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban development."

The findings, policies and implementation strategies of this chapter address general issues related to public facilities and services as well as issues concerning water, sewage disposal, police and fire protection, schools, health services and local government facilities to name a few.

Detailed information related to public facilities and services is available in the "Comprehensive Plan Report: Public Facilities and Services," and a variety of facilities master plans and background reports developed by or for the City.

7.1 GENERAL

Findings

- Community goals emphasize the desire to maintain the high quality of facilities and services within the City.
- The community's facilities and services are an important management tool in the conservation and development of land within the urban planning area.
- Plans and programs need to be developed for the expansion of urban services in a logical and orderly manner. This should include a funded and effective capital improvement program.
- Phasing adequate public facilities and services to support residential development is necessary to meet community needs.
- The City of Tigard and related service districts have the duty, within their means, to provide adequate services to meet the demand for all development within the planning area during the planning period.

- Phasing the facilities expansion is necessary for orderly growth.
- Formation of private utility districts (water, sewer) could create land management problems within the Urban Planning Area.
- A capital improvements program would facilitate the coordination and expansion for providing transportation, utilities and other public facilities.

[II-41] POLICIES

7.1.1 THE CITY SHALL:

a. PREPARE AND IMPLEMENT A CAPITAL IMPROVEMENTS PROGRAM IN CONJUNCTION WITH WASHINGTON COUNTY AND THE APPLICABLE SERVICE DISTRICTS;

b. WORK WITH THE SERVICE DISTRICTS TO PROVIDE A COORDINATED SYSTEM FOR PROVIDING SERVICES;

c. PROVIDE URBAN SERVICES IN ACCORDANCE WITH THE COMPREHENSIVE PLAN TO THE EXTENT OF THE CITY'S FINANCIAL RESOURCES;

d. USE THE CAPITAL IMPROVEMENTS PROGRAM AS A MEANS FOR PROVIDING FOR ORDERLY GROWTH AND THE EFFICIENT USE OF LAND;

e. DEVELOP A COMPREHENSIVE PLAN WITH CONSIDERATION BEING GIVEN TO THE LEVEL AND CAPACITY OF THE EXISTING SERVICES; AND

f. ADOPT LOCATIONAL CRITERIA AS THE BASIS FOR MAKING DECISIONS ABOUT THE PROPER LOCATION FOR PUBLIC FACILITIES.

7.1.2 THE CITY SHALL REQUIRE AS A PRE-CONDITION TO DEVELOPMENT APPROVAL THAT:

a. DEVELOPMENT COINCIDE WITH THE AVAILABILITY OF ADEQUATE SERVICE CAPACITY INCLUDING:

1. PUBLIC WATER;
2. PUBLIC SEWER SHALL BE REQUIRED FOR NEW DEVELOPMENT WITHIN THE CITY UNLESS THE PROPERTY INVOLVED IS OVER 300 FEET FROM A SEWER LINE AND WASHINGTON COUNTY HEALTH DEPARTMENT APPROVAL FOR A PRIVATE DISPOSAL SYSTEM IS OBTAINED; AND
3. STORM DRAINAGE.

b. THE FACILITIES ARE:

1. CAPABLE OF ADEQUATELY SERVING ALL INTERVENING PROPERTIES AND THE PROPOSED DEVELOPMENT; AND
2. DESIGNED TO CITY STANDARDS.

c. ALL NEW DEVELOPMENT UTILITIES TO BE PLACED UNDERGROUND.

(Rev. Ord. 86-08)

IMPLEMENTATION STRATEGIES

1. As a part of the ongoing planning program, the City will prepare a capital improvements program; and

a. The staging of facilities will be based on the availability of financial resources;

b. [II-42] Priorities will be based on considerations of:

1) Health and safety factors;

2) Cost-benefit factors; and

3) Social and economic needs.

2. As a part of the Community Development Code, standards will be included in:

a. The Land Division Ordinance for the construction of services; and

b. The Community Development Code which requires future subdivision plans in areas where allowed densities due to a lack of services are less than the plan densities.

3. Where sewer is not available to site, the developer shall be required to extend the services to the site at the developer's cost. The City shall adopt an ordinance providing for partial cost as intervening parcels are developed by the intervening landowners.

4. The Tigard Community Development Code shall establish an ordinance which indicates:

a. That services shall be extended from property line to property line, including services located in adjacent rights-of-way; except

b. That the ordinance shall allow for the phasing of such services if a development proposal indicates such phasing.

The intent of these policies is to develop a mechanism for an orderly and logical development and expansion of services to promote an efficient use of land and thus an

efficient growth pattern. This mechanism will basically be concerned with: Planning for public facilities in advance of need in a manner which will implement land use policy. This shall help direct the urban expansion and growth.

7.2 STORM DRAINAGE AND WASTEWATER MANAGEMENT

Findings

- The major drainage problem in Tigard is the storm-water runoff throughout the area.
- The primary water quantity problem is overbank flooding that occurs when storm-water quantity exceeds channel capacity.
- CH_2M Hill, Inc. developed a "Master Drainage Plan" for the City in 1981, which incorporates existing storm-water detention and subdivision procedures and standards with the recommended changes to the existing floodplain management program.
- There is an emphasis on the retention of a vegetation buffer along streams and drainageways to reduce run-offs and flood damage, and provide for erosion control.
- Most of the following policies have been transformed into City regulations.

[II-43] POLICIES

7.2.1 THE CITY SHALL REQUIRE AS A PRE-CONDITION TO DEVELOPMENT THAT:

a. A SITE DEVELOPMENT STUDY BE SUBMITTED FOR DEVELOPMENT IN AREAS SUBJECT TO POOR DRAINAGE, GROUND

INSTABILITY OR FLOODING WHICH SHOWS THAT THE DEVELOPMENT IS SAFE AND WILL NOT CREATE ADVERSE OFF-SITE IMPACTS: [sic]

b. NATURAL DRAINAGE WAYS BE MAINTAINED UNLESS SUBMITTED STUDIES SHOW THAT ALTERNATIVE DRAINAGE SOLUTIONS CAN SOLVE ON-SITE DRAINAGE PROBLEMS AND WILL ENSURE NO ADVERSE OFF-SITE IMPACTS;

c. ALL DRAINAGE CAN BE HANDLED ON-SITE OR THERE IS AN ALTERNATIVE SOLUTION WHICH WILL NOT INCREASE THE OFF-SITE IMPACT;

d. THE 100-YEAR FLOODPLAIN ELEVATION AS ESTABLISHED BY THE 1981 FLOOD INSURANCE STUDY CONDUCTED BY THE U.S. ARMY CORPS OF ENGINEERS BE PROTECTED; AND

e. EROSION CONTROL TECHNIQUES BE INCLUDED AS A PART OF THE SITE DEVELOPMENT PLAN.

7.2.2 THE CITY SHALL:

a. INCLUDE IN ITS CAPITAL IMPROVEMENTS PROGRAM, PLANS FOR SOLVING DRAINAGE PROBLEMS IN THE EXISTING DEVELOPED AREAS;

b. RECOGNIZE AND ASSUME ITS RESPONSIBILITY FOR OPERATING, PLANNING AND REGULATING WASTEWATER SYSTEMS AS DESIGNATED IN THE MSD WASTEWATER TREATMENT MANAGEMENT "208" PLAN; AND

c. APPLY ALL APPLICABLE FEDERAL AND STATE LAWS AND REGULATIONS WITH RESPECT TO WASTEWATER.

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[II-47] 7.6 FIRE PROTECTION

Findings

- Currently, the City of Tigard is serviced by the Tualatin Rural Fire District and Washington County Fire District #1.
- [II-48] Continued growth and urbanization places additional need for fire related services.
- Congestion on some area streets slows the response time to fires. Among locations where this has been noticed are:

  Vicinity of Greenburg & Tiedeman;
  Pacific Highway;
  Main Street;
  Hall Boulevard between Commercial and Pacific Highway;
  Walnut Street;
  Tiedeman;
  Railroad crossings at Hall Boulevard and Main Street.

During flooding, some bridges may be closed (e.g., at Grant Street and on Hall Boulevard) necessitating the use of time consuming circuitous routes.

- Subdivision plats can create access problems when there are too few through streets. There are numerous examples of dead end streets throughout the City.

POLICY

7.6.1 THE CITY SHALL REQUIRE AS A PRE-CONDITION TO DEVELOPMENT THAT:

a. THE DEVELOPMENT BE SERVED BY A WATER SYSTEM HAVING ADEQUATE WATER PRESSURE FOR FIRE PROTECTION PURPOSES;

b. THE DEVELOPMENT SHALL NOT REDUCE THE WATER PRESSURE IN THE AREA BELOW A LEVEL ADEQUATE FOR FIRE PROTECTION PURPOSES; AND

c. THE APPLICABLE FIRE DISTRICT REVIEW ALL APPLICATIONS.

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[II-54] 8. TRANSPORTATION

This chapter addresses Statewide Planning Goal #12:

> Transportation which requires local jurisdictions "to provide and encourage a safe, convenient and economic transportation system."

Transportation planning has been defined as " . . . the process by which transportation improvements or new facilities are systematically conceived, tested as to present and future adequacy, and programmed for future construction. Modern transportation planning emphasizes the total transportation system. It considers all modes of

transport which are economically feasible to a state, region or urban area." (Goodman & Freund, Principals and Practices of Urban Planning, "Transportation Planning")

The transportation plan for Tigard reaches beyond the Tigard Planning Area and includes traffic and transportation impacts within other areas of the southwest subregion of the Portland Metropolitan Area. The Metropolitan Service District (MSD) acts as the regional coordinator for transportation planning throughout the Portland Metropolitan Area. The other major service district impacting Tigard is Tri-Met which is charged with the responsibility for providing public transportation throughout the metropolitan area.

The Comprehensive Plan proposes a land use plan that encourages and facilitates balanced transportation development for the City. The plan recognizes that land use and transportation investments are interconnected and that relationship should be reinforced to produce an acceptable urban environment.

Detailed information concerning transportation in the Tigard Urban Planning Area is available in the "Comprehensive Plan Report: Transportation."

8.1 TRAFFICWAYS

Findings

- A need exists to place all of the existing public local and collector streets in the Tigard City Limits under the City's jurisdiction.

- According to a Washington County computer [sic] study 48-60% of Tigard residents work outside of the Washington County area.
- Between 77-83% of Tigard residents commute to work by auto as single occupants.
- Major congestion problems within the City have resulted from the rapid population growth since 1970, creating a need for major street improvements.
- A corridor study for Pacific Highway (99W) has not been prepared by MSD. It is the only major trafficway within the region which has not been studied. Pacific Highway, the major trafficway through the City, has the highest traffic volumes, congestion and accident[s] rates within the City. There is a need to prepare a corridor study for Pacific Highway. The City, Metropolitan Service District and [the] State should coordinate such a study.
- [II-55] Many of the streets in Tigard are dead-ended which adds to the congestion on existing completed streets. Therefore, a number of street connections need to be constructed.
- A major concern of the community regarding transportation is the need to maintain and improve the livability of residential areas in the face of increasing population and transportation requirements.
- The City needs to develop a strategy to coordinate public street improvements with private sector improvements to achieve the most effective use of the limited dollars available for road development and improvement.
- Major residential growth during the planning period is expected to occur in the westerly and southerly areas of Tigard. Both of these areas lack adequate improved trafficways.

- A need exists during the planning period to complete a collector street system between Scholls Ferry Road, Walnut Street, Gaarde Street, Bull Mountain Road and Pacific Highway. The location of these connections needs to be coordinated between the City, County, State and [the] Metropolitan Service District.
- A need exists to complete the collector street system within the Tigard Triangle area to make more of this area accessible to developers, employers and employees.

POLICIES

8.1.1 THE CITY SHALL PLAN FOR A SAFE AND EFFICIENT STREET AND ROADWAY SYSTEM THAT MEETS CURRENT NEEDS AND ANTICIPATED FUTURE GROWTH AND DEVELOPMENT.

8.1.2 THE CITY SHALL PROVIDE FOR EFFICIENT MANAGEMENT OF THE TRANSPORTATION PLANNING PROCESS WITHIN THE CITY AND THE METROPOLITAN AREA THROUGH COOPERATION WITH OTHER FEDERAL, STATE, REGIONAL AND LOCAL JURISDICTIONS.

8.1.3 THE CITY SHALL REQUIRE AS A PRECONDITION TO DEVELOPMENT APPROVAL THAT:

a. DEVELOPMENT ABUT A PUBLICLY DEDICATED STREET OR HAVE ADEQUATE ACCESS APPROVED BY THE APPROPRIATE APPROVAL AUTHORITY;

b. STREET RIGHT-OF-WAY BE DEDICATED WHERE THE STREET IS SUBSTANDARD IN WIDTH;

c. THE DEVELOPER COMMIT TO THE CONSTRUCTION OF THE STREETS, CURBS AND

SIDEWALKS TO CITY STANDARDS WITHIN THE DEVELOPMENT;

d. INDIVIDUAL DEVELOPERS PARTICIPATE IN THE IMPROVEMENT OF EXISTING STREETS, CURBS AND SIDEWALKS TO THE EXTENT OF THE DEVELOPMENT'S IMPACTS;

e. STREET IMPROVEMENTS BE MADE AND STREET SIGNS OR SIGNALS BE PROVIDED WHEN THE DEVELOPMENT IS FOUND TO CREATE OR INTENSIFY A TRAFFIC HAZARD;

f. TRANSIT STOPS, BUS TURNOUT LANES AND SHELTERS BE PROVIDED WHEN THE PROPOSED USE [IS] OF A TYPE WHICH GENERATES TRANSIT RIDERSHIP;

g. [II-56] PARKING SPACES BE SET ASIDE AND MARKED FOR CARS OPERATED BY DISABLED PERSONS AND THAT THE SPACES BE LOCATED AS CLOSE AS POSSIBLE TO THE ENTRANCE DESIGNED FOR DISABLED PERSONS; AND

h. LAND BE DEDICATED TO IMPLEMENT THE BICYCLE/PEDESTRIAN CORRIDOR IN ACCORDANCE WITH THE ADOPTED PLAN.

8.1.4 WHEN THE ACTUAL ROUTES OF FUTURE TRANSPORTATION IMPROVEMENTS HAVE NOT BEEN DETERMINED, THE CITY SHALL DESIGNATE STUDY AREAS ON THE COMPREHENSIVE PLAN TRANSPORTATION MAP AND PROVIDE GENERAL PROJECT DESCRIPTIONS TO:

a. IDENTIFY THE APPROXIMATE AREAS WITHIN WHICH THESE PROJECTS WILL OCCUR, AND;

b. TO EXPLAIN THE TYPE AND EXTENT OF THESE FUTURE IMPROVEMENTS.

8.1.5 WHEN REVIEWING DEVELOPMENT APPLICATIONS WITHIN COMPREHENSIVE TRANSPORTATION PLAN MAP STUDY AREAS, THE CITY SHALL WORK WITH APPLICANTS TO AVOID CONFLICT WITH THE LOCATION OF FUTURE TRANSPORTATION IMPROVEMENTS.

8.1.6 A CHANGE IN ROADWAY CLASSIFICATION, OR LOCATION SHALL REQUIRE AN AMENDMENT TO THE COMPREHENSIVE PLAN TRANSPORTATION MAP, AND; WHEN THE LOCATION OF ALL OR A PORTION OF A ROADWAY WITHIN A TRANSPORTATION MAP STUDY AREA HAS BEEN DETERMINED, THE MAP WILL BE AMENDED BY:

a. DESIGNATING THE LOCATION OF THE ROADWAY.

b. DESIGNATING ITS CLASSIFICATION, AND;

c. DELETING THE APPROPRIATE PORTION OF THE STUDY AREA INVOLVED.

8.1.7 THE CITY SHALL SUPPORT THE GOALS AND OBJECTIVES OF THE OREGON DEPARTMENT OF TRANSPORTATION TO IMPROVE TRAFFIC FLOW AND CAPACITY AT THE INTERCHANGE OF I-5 AND HIGHWAY 217/KRUSE WAY. HOWEVER, THE CITY RETAINS THE PREROGATIVE TO REVIEW, COMMENT AND CONCUR WITH THE ACTUAL ALIGNMENTS OF THE PROJECT.

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[II-59] 8.4 PEDESTRIAN AND BICYCLE PATHWAYS

Findings

- As the City of Tigard continues to grow, more people may rely on the bicycle and pedestrian pathways for utilitarian as well as for recreational purposes.
- In 1974, the City Council adopted a Comprehensive Pedestrian/Bicycle Pathway Plan.
- The City has required adjacent development to install that portion of the bicycle/pedestrian pathways shown on the adopted plan which abuts the development.
- The City has implemented portions of the adopted plan through the City's overlay program.
- The adopted Bicycle/Pedestrian Plan provides for a dual function pathway system; bicycles and pedestrians use the same system.

POLICY

8.4.1 THE CITY SHALL LOCATE BICYCLE/PEDESTRIAN CORRIDORS IN A MANNER WHICH PROVIDES FOR PEDESTRIAN AND BICYCLE USERS, SAFE AND CONVENIENT MOVEMENT IN ALL PARTS OF THE CITY, BY DEVELOPING THE PATHWAY SYSTEM SHOWN ON THE ADOPTED PEDESTRIAN/BIKEWAY PLAN.

IMPLEMENTATION STRATEGIES

1. The City shall review each development request adjacent to areas proposed for pedestrian/bike pathways to ensure that the adopted plan is properly implemented, and require the necessary easement or dedications for the pedestrian/bicycle pathways.

2. [II-60] The City shall review and update the adopted Pedestrian/Bikeway Plan on a regular basis to ensure all developing areas have accessibility to the Pedestrian/Bikeway system.
3. The City shall coordinate with Washington County to connect the City's Pedestrian/Bike Pathway system to the County's system.
4. City codes shall include provisions which prohibit motor driven vehicles on designated and maintained pedestrian/bicycle pathways.

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APPENDIX B

EXCERPTS FROM THE TIGARD COMMUNITY DEVELOPMENT CODE (CDC)

Chapter 18.10

CONSISTENCY WITH THE PLAN AND LAWS

Sections:

18.10.010 Consistency with the Plan and Laws

A. Each development and use application and other procedure initiated under this title shall be consistent with the adopted comprehensive plan of the City of Tigard as implemented by this title and with applicable state and federal laws and regulations. All provisions of this title shall be construed in conformity with the adopted comprehensive plan. (Ord. 89-06; Ord. 83-52)

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Chapter 18.16

PRE-EXISTING APPROVALS

Sections:

18.16.010 Pre-existing Approvals

A. Planned developments, including the approved density, subdivisions, projects requiring site development review approval or other development applications for which approvals were granted prior to the effective date of the code codified in this title may occur pursuant to such approvals.

B. All development proposals received by the Director after the adoption of this title shall be subject to review for conformance with the standards under this title or as otherwise provided by state law. (Ord. 89-06; Ord. 83-52)

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18.32.050 Application Submittal Requirements: Refusal of an Application

A. The application shall be made on forms provided by the Director as provided by Subsection 18.32.060.A.1.

B. The application shall:

1. Include the information requested on the application form;
2. Address appropriate criteria in sufficient detail for review and action;
3. Be accompanied by the required fee; and
4. Include a list of names and addresses of all persons who are surrounding property owners of record as required by the specific application section of this title. The records of the Washington County Department of Assessment and Taxation shall be the official records for determining ownership.

C. The Director shall not accept:

1. An incomplete application, except as otherwise provided by Section 18.32.080; or
2. Applications not accompanied by the required fee.

D. An application shall be deemed incomplete unless it addresses each element required to be

considered under applicable provisions of this code and the application form.

E. If an application for a permit or zone change is incomplete, the Director shall:

1. Notify the applicant within 30 days of receipt of the application of exactly what information is missing; and

2. Allow the applicant to submit the missing information.

F. The application for a permit or a zone change shall be deemed complete when the missing information is provided and at that time the 120-day time period shall begin to run for the purposes of satisfying state law.

G. If the applicant refuses to submit the missing information required for a permit or a zone change application, the application shall be deemed complete on the 31st day after the Director first received the application. This in no way negates the applicant's burden of proof, but it is for the purpose of allowing an application to be submitted for hearing. Ord. 90-41; Ord. 89.06; Ord. 83-52)

* * *

18.32.060 Duties of the Director

A. The Director shall:

1. Prepare application forms made pursuant to the standards contained in the applicable state law, comprehensive plan, and implementing ordinance provisions;

2. Accept all development applications which comply with the provisions of Section 18.32.050;

3. Within 60 days after an application is deemed complete pursuant to this chapter, except as provided by Section 18.32.110:

a. Give notice as provided by Sections 18.32.130 and 18.32.140 except as provided by Section 18.32.120;

b. Prepare a staff report or notice of decision which shall include:

(i) The facts deemed relevant to the proposal and found by the Director to be true;

(ii) Until the City's comprehensive plan is acknowledged, those statewide planning goals deemed to be applicable and the reasons why any other goal is not applicable to the proposal. The Director or approval authority need not deal with statewide planning goals 15-19, which are not applicable in Tigard;

(iii) Those portions of the Tigard comprehensive plan and implementing ordinances which the Director deems to be applicable to the proposal. If any portion of the plan or ordinances appear to be reasonably related to the proposal and are deemed not applicable by the Director, the Director shall explain why such portion or portions are not applicable;

(iv) An analysis relating the facts deemed true by the Director to the applicable criteria and a consideration of alternatives open to the approval authority, resulting in a recommendation of denial, approval, or approval with conditions under Section 18.32.250; and

(v) A statement regarding a waiver of information or additional information required by the Director as provided by Section 18.32.080;

c. In the case of an application subject to a Director's decision, make the staff report and all case-file materials available at the time the notice of the decision is given;

d. In the case of an application subject to a hearing, make the staff report available 7 days prior to a scheduled hearing date and the case-file materials available when notice is mailed, as provided by Section 18.32.130(A)(1).

e. Act on the development application pursuant to Subsection 18.32.090.A and Section 18.32.110 or cause a hearing to be held pursuant to Subsections 18.32.090.B through D and Sections 18.32.160 through 18.32.230 and Section 18.32.240, unless the applicant has requested or consented to a delay;

4. Administer the hearings process pursuant to Sections 18.32.130 through 18.32.190 and Section 18.32.200;

5. Maintain a register of all applications which have been filed for a decision. The register

shall identify at what stage the application is in the process;

6. File notice of the final decision in the records of the Planning Division and mail a copy of the notice of the final decision to the applicant and all parties and to those persons requesting copies of such notices who pay the necessary fees therefor as provided by Sections 18.32.120 or 18.32.130;

7. Maintain and preserve the file for each application. The file shall include, as applicable, a list of persons required to be given notice and a copy of the notice given pursuant to Section 18.32.120 or 18.32.130 and the accompanying affidavits, the application and all supporting information, the staff report, the final decision, including the findings, conclusions and conditions, if any, all correspondence, the minutes of any meeting at which the application was considered and any other exhibit, information or documentation which was considered by the hearing body with respect to the application; and

8. Administer the appeals and review process pursuant to Sections 18.32.290 through 18.32.370. (Ord. 90-41; Ord. 89-06; Ord. 84-69; Ord. 83-52)

* * *

18.32.250 The Decision Process of the Approval Authority

A. The decision shall be based on:

1. Proof by the applicant that the application fully complies with:

a. The City of Tigard comprehensive plan; and

b. The relevant approval standard found in the applicable chapter(s) of this title or other applicable implementing ordinances;

2. The standards and criteria that were applicable at the time the application was determined to be complete at such time as the City's plan and applicable ordinances are acknowledged.

B. Consideration may also be given to:

1. Proof of a change in the neighborhood or community or a mistake in the comprehensive plan or zoning map as it relates to the property which is the subject of the development application; and

2. Factual oral testimony or written statements from the parties, other persons and other governmental agencies relevant to the existing conditions, other applicable standards and criteria, possible negative or positive attributes of the proposal or factors in Subsections A or B.1 of this section.

C. In all cases, the decision shall include a statement in a form addressing the requirements of Subsection 18.32.060.A.3.b which refers to the Director's staff report.

D. The approval authority may:

1. Adopt findings and conclusions contained in the staff report;

2. Adopt findings and conclusions of a lower approval authority;

3. Adopt its own findings and conclusions;

4. Adopt findings and conclusions submitted by any party provided all parties have had an opportunity to review the findings and comment on the same; or

5. Adopt findings and conclusions from another source, either with or without modification, having made a tentative decision, and having directed staff to prepare findings for review and to provide an opportunity for all parties to comment on the same.

E. The decision may be for denial, approval, or approval with conditions, pursuant to subsection 2 of this section.

1. Conditions may be imposed where such conditions are necessary to:

a. Carry out applicable provisions of the Tigard comprehensive plan;

b. Carry out the applicable implementing ordinances; and

c. Ensure that adequate public services are provided to the development or to ensure that other required improvements are made;

2. Conditions may include, but are not limited to; [sic]

a. Minimum lot sizes;

b. Larger setbacks;

c. Preservation of significant natural features; and

d. Dedication of easements;

3. Conditions of approval shall be fulfilled within the time limit set forth in the decision or, if no time limit is set forth, within one year. Failure to fulfill any condition of approval within the time limitations provided may be grounds for revocation of approval, after notice and an opportunity to be heard as an administrative action;

4. Changes, alterations or amendments to the substance of the conditions of approval shall be processed as a new administrative action;

5. Prior to the commencement of development, i.e. the issuance of any permits or the taking of any action under the approved development application, the owner and any contract purchasers of the property which is the subject of the approved application, may be required to sign and deliver to the Director their acknowledgment and consent to such conditions;

6. The conditional approval may require the owner of the property to sign within a time certain or, if no time is designated, within a reasonable time, a contract with the City for enforcement of the conditions and:

   a. The Council shall have the authority to execute such contracts on behalf of the City;

   b. If a contract is required by a conditional approval, no building permit shall be issued for the use covered by the application until the executed contract is recorded in a real property record of the applicable County and filed in the County records; and

   c. Such contracts shall be enforceable against the signing parties, their heirs, successors and assigns by the City by appropriate action in law or suit in equity for the benefit of appropriate action in law or suit in equity for the benefit of public health, safety, and welfare; and

7. A bond in a form acceptable to the Director or, upon appeal or review by the appropriate approval authority, a cash deposit from the property owners or contract purchasers in such an amount as will ensure compliance with the conditions imposed pursuant to the Section, may be required. Such bond or deposit shall be posted prior to the issuance of a building permit for the use covered by the application.

F. The final decision on the application may grant less than all of the parcel which is the subject of the application. (Ord. 90-41; Ord. 89-06; Ord. 83-52)

* * *

Chapter 18.66

CBD: CENTRAL BUSINESS DISTRICT

Sections:

18.66.010 Purpose

A. The purpose of the CBD zoning district is to provide for a concentrated, central commercial office, and retail area which also provides civic, high density residential, and mixed uses. (Ord. 89-06; Ord. 83-52)

18.66.020 Procedures and Approval Process

A. A permitted use, Section 18.66.030, is a use which is allowed outright, but is subject to all applicable provisions of this title. If a use is not listed as a permitted use, it may be held to be a similar unlisted use under the provisions of Chapter 18.43, Unlisted Use.

B. A conditional use, Section 18.66.040, is a use the approval of which is discretionary with the Hearings Officer. The approval process and criteria for approval are set forth in Chapter 18.130, Conditional Use. If a use is not listed as a conditional use, it may be held to be a similar unlisted use under the provisions of Chapter 18.43, Unlisted Use. (Ord. 90-41; Ord. 89-06; Ord. 83-52)

18.66.030 Permitted Uses

A. Permitted uses in the CBD district are as follows:

1. Civic use types:
   a. Public administrative agency;
   b. Community recreation;
   c. Cultural exhibits and library services;
   d. Lodges, fraternal, and civic assembly;
   e. Parking facilities;
   f. Postal services;
   g. Public safety services;
   h. Public support facilities; and
   i. Religious assembly;
2. Commercial use types:
   a. Amusement enterprises;
   b. Animal sales and services:
      (i) Grooming; and
      (ii) Veterinary, small animals;
   c. Automotive and equipment:
      (i) Cleaning; and
      (ii) Repairing, light equipment;
   d. Building maintenance services;
   e. Business equipment sales and services;
   f. Business support services;
   g. Communication services;

h. Convenience sales and personal services;

i. Eating and drinking establishments;

j. Financial, insurance, and real estate services;

k. Food and beverage sales;

l. Medical and dental services;

m. Participation sports and recreation:

(i) Indoor; and

(ii) Outdoor;

n. Personal services, general;

o. Professional and administrative services;

p. Religious assembly;

q. Repair services, consumer;

r. Retail sales, general;

s. Transient lodging;

3. Residential Use Types (See R-40 and R-12 for development standards):

a. Single-family attached residential units;

b. Multiple-family residential units; and

c. Home occupations subject to provisions of Chapter 18.142.

d. The CBD zoning district allows for R-40 residential development except within the area south of Fanno Creek defined as follows:

e. All lands bounded by Fanno Creek, Hall Boulevard, Omara, Ash Avenue and Hill

Street within the CBD shall be designated R-12 PD and shall be developed as planned developments in conformance with the R-12 district standards.

f. Family day care;

4. Temporary use;

5. Fuel tank; or

6. Accessory structures. (Ord. 90-41; Ord. 89-06; Ord. 86-08; Ord. 84-73; Ord. 83-52)

18.66.040 Conditional Uses (See Chapter 18.130)

A. Conditional uses in the CBD district are as follows:

1. Adult entertainment;

2. Automotive and equipment sales/retail, light equipment;

3. Children's day care;

4. Utilities;

5. Heliports, in accordance with the Aeronautics Division (ODOT) and the FAA;

6. Hospitals;

7. Spectator sport and entertainment facilities;

8. Residential care facility;

9. Vehicle fuel sales; and

10. Wholesale, storage, and distribution. (Ord. 90-41; Ord. 89-06; Ord. 83-52)

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Chapter 18.84
SENSITIVE LANDS

Sections:

18.84.010 Purpose

A. Sensitive lands are lands potentially unsuitable for development because of their location within

the 100-year floodplain, within natural drainageway, within a wetland area, on steep slopes, or on unstable ground.

B. Sensitive land areas are designated as such to protect the public health, safety, and welfare of the community through the regulation of these sensitive land areas.

C. Sensitive land regulations contained in this chapter are intended to maintain the integrity of the rivers, streams, and creeks in Tigard by minimizing erosion, promoting bank stability, maintaining and enhancing water quality, and fish and wildlife habitats, and preserving scenic quality and recreational potentials.

D. The regulations of this chapter are intended to implement the comprehensive plan and the Federal Emergency Management Agency's flood insurance program, and help to preserve natural sensitive land areas from encroaching use and to maintain the September 1981 zero-foot rise floodway elevation.

E. The areas of special flood hazard identified by the Federal Insurance Administration in a scientific and engineering report entitled "The Flood Insurance Study of the City of Tigard," dated September 1, 1981, with accompanying Flood Insurance Maps (updated February, 1984) is hereby adopted by reference and declared to be a part of this chapter. This Flood Insurance Study is on file at the Tigard Civic Center.

F. When base flood elevation data has not been provided in accordance with Subsection 18.84.010.E, the Director shall obtain, review and reasonably utilize any base flood elevation and floodway data available from a federal, state or

other source, in order to administer Subsections 18.84.026.I and J) [sic].

G. Where elevation data is not available either through the Flood Insurance Study or from another authoritative source, applications for building permits shall be reviewed to assure that proposed construction will be reasonably safe from flooding. The test of reasonableness is a local judgment and includes use of historical data, high water marks, photographs of past flooding, etc., where available. Failure to elevate at least two feet above grade in these sensitive land areas may result in higher insurance rates.

H. City actions under this chapter will recognize the rights of riparian owners to be free to act on the part of the City, its Commissions, representatives and agents, and land owners and occupiers.

I. For the purposes of this chapter, the word "structure" shall exclude: children's play equipment, picnic tables, sand boxes, shelters, grills, basketball hoops and similar recreational equipment. (Ord. 90-29; Ord. 89-06; Ord. 87-66; Ord. 87-32; Ord. 83-52)

18.84.015 Applicability of Uses: Permitted, Prohibited, and Nonconforming

A. Except as provided by Subsection 18.84.015.B, the following uses are outright permitted uses within sensitive land areas:

1. Accessory uses such as lawns, gardens, or play areas, except in wetlands;

2. Agricultural uses conducted without locating a structure within the sensitive land area, except in wetlands;

3. Community recreation uses such as bicycle and pedestrian paths or athletic fields or parks, excluding structures, except in wetlands;

4. Public and private conservation areas for water, soil, open space, forest, and wildlife resources;

5. Removal of poison oak, tansy ragwort, blackberry, or other noxious vegetation;

6. Maintenance of floodway excluding rechanneling; and

7. Fences, except in the floodway area.

B. Separate permits shall be obtained from the appropriate community development division for the following:

1. Installation of underground utilities and construction of roadway improvements including sidewalks, curbs, streetlights, and driveway aprons;

2. Minimal ground disturbance(s) but no landform alterations; and

3. Repair, reconstruction, or improvement of an existing structure or utility, the cost of which is less than 50 percent of the market value of the structure prior to the improvement or the damage requiring reconstruction provided no development occurs in the floodway.

C. Landform alterations or developments within wetland areas that meet the jurisdictional requirements and permit criteria of the U.S. Army Corps of Engineers, Division of State Lands, Unified Sewerage Agency, and/or other federal, state, or regional agencies do not require

a sensitive lands permit. All other applicable City requirements must be satisfied, including sensitive land permits for areas meeting non-wetland sensitive land criteria.

D. A sensitive lands permit approval shall be obtained before construction or development begins within any area of special flood hazard or drainageway as established in Section 18.84.015.B and C. The permit shall apply to all structures including manufactured homes.

E. Except as explicitly authorized by other provisions of this chapter, all other uses are prohibited on sensitive land areas.

F. A use established prior to the adoption of this title, which would be prohibited by this Chapter or which would be subject to the limitations and controls imposed by this Chapter, shall be considered a nonconforming use. Nonconforming uses shall be subject to the provisions of Chapter 18.132. (Ord. 90-29; Ord. 89-06; Ord. 87-66; Ord. 87-32; Ord. 84-36; Ord. 83-52)

18.84.020 Administration and Approval Process

A. The applicant for a sensitive lands permit shall be the recorded owner of the property or an agent authorized in writing by the owner.

B. A preapplication conference with City staff is required. (See Section 18.32.040.) If uncertainty exists in regards to the location or configuration of wetland areas, staff shall make an on-site inspection prior to an application being initiated to determine the nature and extent of the resource. If necessary, assistance from state and federal agencies shall be sought to provide the applicant additional information.

C. Due to possible changes in state statutes, or regional or local policy, information given by staff to the applicant during the preapplication conference is valid for not more than six months:

1. Another preapplication conference is required if any variance application is submitted more than six months after the preapplication conference; and

2. Failure of the Director to provide any of the information required by this chapter shall not constitute a waiver of the standard, criteria or requirements of the application.

D. The Hearings Officer shall approve, approve with conditions, or deny an application for a sensitive lands permit within the 100-year floodplain. The Hearings Officer's decision may be reviewed by the Council as provided by Subsection 18.32.310.B.

E. The Director shall approve, approve with conditions, or deny an application for a sensitive lands permit as set forth in Section 18.84.015.D. The decision made by the Director may be appealed to the Commission as provided by Subsection 18.32.310.A.

F. The appropriate approval authority shall review all sensitive lands permit applications to determine that all necessary permits shall be obtained from those federal, state, or local governmental agencies from which prior approval is also required.

G. The Director shall notify communities adjacent to the affected area and the State Department of Land Conservation and Development prior to any alteration or relocation of a watercourse, and submit evidence of such notification to the Federal Insurance Administration.

H. The Director shall require that maintenance is provided within the altered and relocated portion of said watercourse so that the flood-carrying capacity is not diminished.

I. The Hearings Officer and the Director shall apply the standards set forth in Section 18.84.040 when reviewing an application for a sensitive lands permit.

J. The Director shall give notice of applications to be heard by the Hearings Officer as provided by Section 18.32.130.

K. The Director shall mail notice of any sensitive lands application decision to the persons entitled to notice under Section 18.32.120. (Ord. 90-29; Ord. 89-06; Ord. 87-66; Ord. 87-32; Ord. 83-52)

18.84.025 Maintenance of Records

A. Where base flood elevation data is provided through the Flood Insurance Study, the Building Official shall obtain and record the actual elevation (in relation to mean sea level) of the lowest floor (including basement) of all new or substantially improved structures, and whether or not the structure contains a basement.

B. For all new or substantially floodproofed structures, the Building Official shall:

1. Verify and record the actual elevation (in relation to mean sea level); and

2. Maintain the floodproofing certifications required in this chapter.

C. For all new or substantially floodproofed structures, the Director shall:

1. Maintain for public inspection all other records pertaining to the provisions in this chapter. (Ord. 89-06; Ord. 87-66; Ord. 87-32; Ord. 83-52)

18.84.026 General Provisions

A. The appropriate approval authority shall review all permit applications to determine whether proposed building sites will be safe from flooding.

B. All new construction and substantial improvements shall be constructed with materials and utilize equipment resistant to flood damage.

C. All new construction and substantial improvements shall be constructed using methods and practices that minimize flood damage.

D. Electrical, heating, ventilation, plumbing, and air-conditioning equipment and other service facilities shall be designed and/or otherwise elevated or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

E. All new and replacement water supply systems shall be designed to minimize or eliminate infiltration of floodwaters into the system in accordance with the Uniform Building Code and Uniform Plumbing Code.

F. All new construction, all manufactured homes and substantial improvements shall be anchored to prevent flotation, collapse, or lateral movement of the structure.

G. New and replacement sanitary sewerage systems shall be designed to minimize or eliminate infiltration of floodwater into the systems and discharge from the systems into floodwaters.

H. On-site water disposal systems shall be located to avoid impairment to them or contamination from them during flooding.

I. Residential Construction

1. New construction and substantial improvement of any residential structure shall have the lowest floor, including basement, elevated to or above base flood elevation; and

2. Fully enclosed areas below the lowest floor that are subject to flooding are prohibited, or shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwaters. Designs for meeting this requirement must either be certified by a registered professional engineer or architect, or must meet or exceed the following minimum criteria:

a. A minimum of two openings having a total net area of not less than one square inch for every square foot of enclosed area subject to flooding shall be provided;

b. The bottom of all openings shall be no higher than one foot above grade; and

c. Openings may be equipped with screens, louvers, or other coverings or devices, provided that they permit the automatic entry and exit of flood waters.

J. Nonresidential Construction

1. New construction and substantial improvement of any commercial, industrial, or other nonresidential structure shall either have the lowest floor, including basement, elevated to the level of the base flood elevation, or together with attendant utility and sanitary facilities, shall:

a. Be floodproofed so that below the base flood level the structure is watertight with walls substantially impermeable to the passage of water;

b. Have structural components capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy;

c. Be certified by a registered professional engineer or architect that the design and methods of construction are in accordance with accepted standards of practice for meeting provisions of this subsection based on their development and/or review of the structural design, specifications and plans. Such certifications shall be provided to the Building Official as set forth in Subsection 18.84.025.B; and

d. Nonresidential structures that are elevated, not floodproofed, must meet the same standards for space below the lowest floor as described in 18.84.026.I.2. Applicants floodproofing nonresidential buildings shall be notified that flood insurance premiums will be based on

rates that are one foot below the flood-proofed level (e.g., a building constructed to the base flood level will be rated as one foot below that level). (Ord. 89-06; Ord. 87-66; Ord. 87-32)

18.84.028 General Provisions for Wetlands

A. Wetland regulations apply to those areas meeting the definition of wetland in Chapter 18.26 of the Community Development Code, areas meeting Division of State Lands wetland criteria and to land adjacent to and within 25 feet of a wetland. Wetland locations may include but are not limited to those areas identified as wetlands in "Wetland Inventory and Assessment for the City of Tigard, Oregon," Scientific Resources Incorporated, 1990.

B. Precise boundaries may vary from those shown on wetland maps; specific delineation of wetland boundaries may be necessary. Wetland delineation will be done by qualified professionals at the applicant's expense. (Ord. 90-29)

18.84.030 Expiration of Approval: Standards for Extension of Time

A. Approval of a sensitive lands permit shall be void if:

1. Substantial construction of the approved plan has not begun within a one-and-one-half year period; or

2. Construction on the site is a departure from the approved plan.

B. The Director shall, upon written request by the applicant and payment of the required fee, grant an extension of the approval period not to exceed one year, provided that:

1. No changes are made on the original plan as approved by the approval authority;

2. The applicant can show intent of initiating construction of the site within the one year extension period; and

3. There have been no changes to the applicable Comprehensive Plan policies and ordinance provisions on which the approval was based.

C. Notice of the decision shall be provided to the applicant. The Director's decision may be appealed by the applicant as provided by Subsection 18.32.310.A. (Ord. 90-41; Ord. 89-06; Ord. 87-66; Ord. 87-32; Ord. 83-52)

18.84.040 Approval Standards

A. The Hearings Officer shall approve or approve with conditions an application request within the 100-year floodplain based upon findings that all of the following criteria have been satisfied:

1. Land form alterations shall preserve or enhance the floodplain storage function and maintenance of the zero-foot rise floodway shall not result in any narrowing of the floodway boundary;

2. Land form alterations or developments within the 100-year floodplain shall be allowed only in areas designated as commercial or industrial on the comprehensive plan land use map, except that alterations or

developments associated with community recreation uses, utilities, or public support facilities as defined in Chapter 18.42 of the Community Development Code shall be allowed in areas designated residential subject to applicable zoning standards;

3. Where a land form alteration or development is permitted to occur within the floodplain it will not result in any increase in the water surface elevation of the 100-year flood [plain];

4. The land form alteration or development plan includes a pedestrian/bicycle pathway in accordance with the adopted pedestrian/bicycle pathway plan, unless the construction of said pathway is deemed by the Hearings Officer as untimely;

5. The plans for the pedestrian/bicycle pathway indicate that no pathway will be below the elevation of an average annual flood;

6. The necessary U.S. Army Corps of Engineers and State of Oregon Land Board, Division of State Lands approvals shall be obtained; and

7. Where land form alterations and/or development are allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area within and adjacent to the floodplain in accordance with the comprehensive plan. This area shall include portions of a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle pathway plan.

B. The Director shall approve or approve with conditions an application request for a sensitive

lands permit on slopes of 25 percent or greater or unstable ground based upon findings that all of the following criteria have been satisfied:

1. The extent and nature of the proposed land form alteration or development will not create site disturbances to an extent greater than that required for the use;

2. The proposed land form alteration or development will not result in erosion, stream sedimentation, ground instability, or other adverse on-site and off-site effects or hazards to life or property;

3. The structures are appropriately sited and designed to ensure structural stability and proper drainage of foundation and crawl space areas for development with any of the following soil conditions: wet/high water table; high shrink-swell capability; compressible/organic; and shallow depth-to-bedrock; and

4. Where natural vegetation has been removed due to land form alteration or development, the areas not covered by structures or impervious surfaces will be replanted to prevent erosion in accordance with Chapter 18.100, Landscaping and Screening.

C. The Director shall approve or approve with conditions an application request for a sensitive lands permit within drainageways based upon findings that all of the following criteria have been satisfied:

1. The extent and nature of the proposed land form alteration or development will not create site disturbances to the extent greater than that required for the use;

2. The proposed land form alteration or development will not result in erosion, stream sedimentation, ground instability, or other adverse on-site and off-site effects or hazards to life or property;

3. The water flow capacity of the drainageway is not decreased;

4. Where natural vegetation has been removed due to land form alteration or development, the areas not covered by structures or impervious surfaces will be replanted to prevent erosion in accordance with Chapter 18.100, Landscaping and Screening;

5. The drainageway will be replaced by a public facility of adequate size to accommodate maximum flow in accordance with the adopted 1981 Master Drainage Plan.

6. The necessary U.S. Army Corps of Engineers and State of Oregon Land Board, Division of State Lands approvals shall be obtained.

7. Where landform alterations and/or development are allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area within and adjacent to the floodplain in accordance with the Comprehensive Plan. This area shall include portions of a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian bicycle pathway plan. (Ord. 90-29; Ord. 90-22; Ord. 89-06; Ord. 87-66; Ord. 87-32; Ord. 86-08; Ord. 84-29; Ord. 83-52)

D. The Director shall approve or approve with conditions an application request for a sensitive lands

permit within wetlands based upon findings that all of the following criteria have been satisfied:

1. The proposed landform alteration or development is neither on wetland in an area designated as significant wetland on the Comprehensive Plan Floodplain and Wetland Map nor is within 25 feet of such a wetland;

2. The extent and nature of the proposed landform alteration or development will not create site disturbances to an extent greater than the minimum required for the use;

3. Any encroachment or change in on-site or off-site drainage which would adversely impact wetland characteristics have been mitigated;

4. Where natural vegetation has been removed due to landform alteration or development, erosion control provisions of the Surface Water Management program of Washington County must be met and areas not covered by structures or impervious surfaces will be replanted in like or similar species in accordance with Chapter 18.100, Landscaping and Screening;

5. All other sensitive lands requirements of this chapter have been met;

6. The provisions of Chapter 18.150; Tree Removal, shall be met.

7. Physical Limitations and Natural Hazards, Floodplains and Wetlands, Natural Areas, and Parks, Recreation and Open Space policies of the Comprehensive Plan have been satisfied. (Ord. 90-29; Ord. 89-06; Ord. 87-66; Ord. 87-32; Ord. 83-52)

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Chapter 18.86
ACTION AREAS

Sections:

18.86.010 Purpose

A. This chapter is designed to implement the policies of the comprehensive plan for action areas which include provisions for a mixture of intensive land uses. (Ord. 89-06; Ord. 87-56)

18.86.015 Applicability of Provisions

A. The provisions of this chapter apply to action areas as designated on the Comprehensive Plan Map: Land Use;

B. All development within an action area is subject to the review and application requirements under Sections 18.120.010 through 18.120.100 and Chapter 18.130 as modified in this chapter. (Ord. 89-06; Ord. 87-56)

18.86.020 Permitted Use

A. Permitted use allowed in an action area shall be as specified in the underlying zoning district. (Ord. 89-06; Ord. 87-56)

18.86.030 Prohibited Use for New Developments

A. The following use is prohibited for new developments:

1. Outdoor storage of materials, products, or supplies. No expansion of existing outdoor storage area will be permitted;

2. Overnight on-site outside storage of fleet vehicles in excess of two single-axle trucks; and

3. Overnight on-site outside storage of construction equipment. (Ord. 89-06; Ord. 87-56)

18.86.035 Conditional Use

A. The following are conditional uses in action areas:

1. Drive-up windows. (See standards contained in Chapter 18.130); and

2. Any other use specified as a conditional use in the underlying zone. (Ord. 89-06; Ord. 87-56)

18.86.040 Interim Requirements

A. In the absence of an adopted design plan, the following issues, under Subsection 18.86.040.A.1.c must be addressed for new developments as necessary to serve the use and provide for projected public facility needs of the area, pursuant to Chapter 18.164 as determined by the Director.

1. The City may attach conditions to any development within an action area prior to adoption of the design plan to achieve the following objectives:

   a. The development shall address transit usage by residents, employees, and customers if the site is within 1/4 mile of a public transit line or transit stop. Specific items to be addressed are as follows:

      (i) Orientation of buildings and facilities towards transit services to provide for direct pedestrian access into the building(s) from transit lines or stops;

      (ii) Minimizing transit/auto conflicts by providing direct pedestrian access into the buildings with limited crossings in automobile circulation/ parking areas. If pedestrian access crosses automobile circulation/parking areas, paths shall be marked for pedestrians;

      (iii) Encouraging transit-supportive users by limiting automobile support services to collector and arterial streets; and

      (iv) Avoiding the creation of small scattered parking areas by allowing adjacent developments to use shared surface parking, parking structures, or under-structure parking;

   b. The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designated

bikepaths or adjacent to a designated greenway/open space/park. Specific items to be addressed are as follows:

      (i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bikepaths identified in the comprehensive plan. If direct connections cannot be made, require that funds in the amount of the construction cost be deposited into an account for the purpose of constructing paths;

      (ii) Separation of auto and truck circulation activities from pedestrian areas;

      (iii) Encouraging pedestrian-oriented design by requiring pedestrian walkways and street level windows along all sides with public access into the building;

      (iv) Provision of bicycle parking as required under Subsection 18.106.020.P; and

      (v) Ensure adequate outdoor lighting by lighting pedestrian walkways and auto circulation areas.

   c. Coordination of development within the action area. Specific items to be addressed are as follows:

      (i) Continuity and/or compatibility of landscaping, circulation, access,

public facilities, and other improvements. Allow required landscaping areas to be grouped together. Regulate shared access where appropriate. Prohibit lighting which shines on adjacent property;

(ii) Siting and orientation of land use which considers surrounding land use, or an adopted plan. Screen loading areas and refuse dumpsters from view. Screen commercial and industrial use from single-family residential through landscaping; and

(iii) Provision of frontage roads or shared access where feasible. (Ord. 89-06; Ord. 87-56)

* * *

Chapter 18.120

SITE DEVELOPMENT REVIEW

Sections:

18.120.010 Purpose

A. The purpose and intent of site development review is to promote the general welfare by directing attention to site planning, and giving regard to the natural environment and the elements of creative design to assist in conserving and enhancing the appearance of the City.

B. It is in the public interest and necessary for the promotion of the health, safety and welfare, convenience, comfort and prosperity of the citizens of the City of Tigard:

1. To implement the City of Tigard's comprehensive plan and other approval standards in this code;

2. To preserve and enhance the natural beauties of the land and of the man-made environment, and enjoyment thereof;

3. To maintain and improve the qualities of and relationships between individual buildings, structures and the physical developments which best contribute to the amenities and attractiveness of an area or neighborhood;

4. To protect and ensure the adequacy and usefulness of public and private developments as they relate to each other and to the neighborhood or area; and

5. To ensure that each individual development provides for a quality environment for the citizens utilizing that development as well as the community as a whole.

C. In order to prevent the erosion of natural beauty, the lessening of environmental amenities, the dissipation of both usefulness and function, and to encourage additional landscaping, it is necessary:

1. To stimulate harmonious design for individual buildings, groups of buildings and structures, and other physical developments;

2. To encourage the innovative use of materials, methods, and techniques and flexibility in building placement; and

3. To integrate the functions, appearances and locations of buildings and improvements so as to best achieve a balance between private prerogatives and preferences, and the public interest and welfare. (Ord. 89-06; Ord. 83-52)

18.120.020 Applicability of Provisions

A. Site development review shall be applicable to all new developments and major modification of existing developments, as provided in Section 18.120.070 except it shall not apply to:

1. Single-family detached dwellings;

2. Manufactured homes on individual lots;

3. A duplex, which is not being reviewed as part of any other development;

4. Minor modifications as provided in Section 18.120.070;

5. Any proposed development which has a valid conditional use approved through the conditional use permit application process; or

6. Mobile home parks and subdivisions;

7. Family day care;

8. Home occupation;

9. Temporary use;

10. Fuel tank; or

11. Accessory structures. (Ord. 90-41; Ord. 89-06; Ord. 87-66; Ord. 84-61; Ord. 84-50; Ord. 83-52)

18.120.030 Administration and Approval Process

A. The applicant for a site development review proposal shall be the recorded owner of the property or an agent authorized in writing by the owner.

B. A preapplication conference with City staff is required. (See Section 18.32.040.)

C. Due to possible changes in state statutes, or regional or local policy, information given by staff to the applicant during the preapplication conference is valid for no more than six months:

1. Another preapplication conference is required if any site development application is submitted six months after the preapplication conference; and

2. Failure of the Director to provide any of the information required by this section shall not constitute a waiver of the standard, criteria or requirements applicable to the applications.

D. The Director shall approve, approve with conditions or deny any application for site development review as provided by Section 18.32.090. The Director shall apply the standards set forth in Section 18.120.180 when reviewing an application for site development review.

E. The decision of the Director may be appealed in accordance with Subsection 18.32.310.A.

F. The Director shall mail notice of any site development review proposal decision to the persons who may have the right to request a hearing before the Commission in accordance with Section 18.32.120. (Ord. 89-06; Ord. 83-52)

* * *

18.120.070 Major Modification to Approved Plans or Existing Development

A. An applicant may request approval of a modification to an approved plan or existing development by:

1. Providing the Director with three copies of the proposed modified site development plan; and

2. A narrative which indicates the rationale for the proposed modification addressing the changes listed in subsection B below.

B. The Director shall determine that a major modification(s) will result if one or more of the following changes are proposed. There will be:

1. An increase in dwelling unit density, or lot coverage for residential development;

2. A change in the ratio or number of different types of dwelling units;

3. A change that requires additional on-site parking in accordance with Chapter 18.106;

4. A change in the type of commercial or industrial structures as defined by the Uniform Building Code;

5. An increase in the height of the building(s) by more than 20 percent;

6. A change in the type and location of accessways and parking areas where off-site traffic would be affected;

7. An increase in vehicular traffic to and from the site and the increase can be expected to exceed 20 vehicles per day;

8. An increase in the floor area proposed for a nonresidential use by more than 10 percent excluding expansions under 5,000 square feet;

9. A reduction in the area reserved for common open space and/or usable open space which reduces the open space area below the minimum required by this code or reduces the open space area by more than 10 percent;

10. A reduction of project amenities below the minimum established by this code or by more than 10 percent where specified in the site plan:

    a. Recreational facilities;

    b. Screening; and/or

    c. Landscaping provisions; and

11. A modification to the conditions imposed at the time of site development review approval which are not the subject of B. 1 through 10 above of this subsection.

C. Upon determining that the proposed modification to the site development plan is a major modification, the applicant shall submit a new application in accordance with Sections 18.120.030 and 18.120.090 for site development review prior to any issuance of building permits.

D. The Director's decision may be appealed as provided by Subsection 18.32.310.A. Notice of the Director's decision need not be given. (Ord. 90-41; Ord. 89-06; Ord. 83-52)

18.120.080 Minor Modification(s) to Approved Plans or Existing Development

A. Any modification which is not within the description of a major modification as provided in Section 18.120.070 shall be considered a minor modification.

B. An applicant may request approval of a minor modification [by]:

    1. Providing the Director with three copies of the proposed modified site development plan; and

    2. A narrative which indicates the rationale for the proposed modification addressing the changes listed in Section 18.120.070.B.

C. A minor modification shall be approved, approved with conditions or denied following the Director's review based on the finding that:

    1. No code provisions will be violated; and

    2. The modification is not a major modification.

D. The Director's decision may be appealed as provided by Subsection 18.32.310.A. (Ord. 89-06; Ord. 83-52)

18.120.090 Application Submission Requirements

A. All applications shall be made on forms provided by the Director and shall be accompanied by:

    1. Copies of the site development plan(s) (number to be determined at the preapplication conference) and necessary data or narrative which explains how the development conforms to the standards, and:

a. The site development plan(s) and required drawings shall be drawn on sheets preferably not exceeding 18 inches by 24 inches;

b. The scale for a site development plan shall be an engineering scale; and

c. All drawings of structure elevations shall be a standard architectural scale, being 1/4 inch or 1/8 inch;

2. A list of the names and addresses of all persons who are property owners of record within 250 feet of the site; and

3. The required fee.

B. The required information may be combined on one map.

C. The site development plan, data, and narrative shall include the following:

1. An existing site conditions analysis, Section 18.120.110;

2. A site plan, Section 18.120.120;

3. A grading plan, Section 18.120.130;

4. A landscape plan, Section 18.120.150;

5. Architectural elevations of all structures, Section 18.120.140;

6. A sign plan, Section 18.120.160; and

7. A copy of all existing and proposed restrictions or covenants. (Ord. 89-06; Ord. 86-23; Ord. 83-52)

18.120.100 Additional Information Required and Waiver of Requirements

A. The Director may require information in addition to that required by this chapter in accordance with Subsection 18.32.080.A.

B. The Director may waive a specific requirement for information in accordance with Subsection 18.32.080.B and C. (Ord. 89-06; Ord. 83-52)

* * *

18.120.120 The Site Development Plan

A. The proposed site development plan shall be at the same scale as the site analysis and shall include the following information:

1. The proposed site and surrounding properties;

2. Contour line intervals (see Subsection 18.120.110.A.3);

3. The location, dimensions and names of all:

a. Existing and platted streets and other public ways and easements on the site and on adjoining properties; and

b. Proposed streets or other public ways and easements on the site;

* * *

18.120.180 Approval Standards

A. The Director shall make a finding with respect to each of the following criteria when approving, approving with conditions, or denying an application:

1. Provisions of the following chapters:

   a. Chapter 18.84, Sensitive Lands;

   b. Chapter 18.94, Manufactured/Mobile Home Regulations;

   c. Chapter 18.92, Density Computation;

   d. Chapter 18.144, Accessory Use and Structures;

   e. Chapter 18.96, Additional Yard Area Requirements;

   f. Chapter 18.98, Building Height Limitations: Exceptions;

   g. Chapter 18.100, Landscaping and Screening;

   h. Chapter 18.102, Visual Clearance Areas;

   i. Chapter 18.106, Off-Street Parking and Loading;

   j. Chapter 18.108, Access, Egress, and Circulation;

   k. Chapter 18.114, Signs;

   l. Chapter 18.150, Tree Removal; and

   m. Chapter 18.164, Street and Utility Improvement Standards.

* * *

18.120.180.A.8.

8. Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient

open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.

* * *

18.120.180.A.15.

15. Drainage:

   a. All drainage plans shall be designed in accordance with the criteria in the adopted 1981 master drainage plan [sic];

* * *

18.120.180.A.18.

18. All of the provisions and regulations of the underlying zone shall apply unless modified by other sections or this title (e.g., the Planned Development, Chapter 18.80; or a Variance granted under Chapter 18.134; etc.) (Ord. 90-41; Ord. 89-06; Ord. 84-29; Ord. 83-52)

* * *

Chapter 18.134

VARIANCE

Sections:

18.134.010 Purpose

A. The purpose of this chapter is to provide standards for the granting of variances from the applicable zoning requirements of this title where it can be shown that, owing to special and unusual circumstances related to a specific piece of the land, the literal interpretation of the provisions of the applicable zone would cause an undue or unnecessary hardship, except that no use variances shall be granted. (Ord. 89-06; Ord. 83-52)

18.134.020 Applicability of Provisions

A. The variance standards are intended to apply to individual platted and recorded lots only.

B. An applicant who is proposing to vary a specification standard for lots yet to be created through a subdivision process may not utilize the variance procedure unless otherwise specified in Chapter 18.148, Zero Lot Line Setback Standards, or Chapter 18.160, Land Division: Subdivision. (Ord. 89-06; Ord. 83-52)

18.134.030 Administration and Approval Process

A. The applicant for a variance shall be the recorded owner of the property or an agent authorized in writing by the owner.

B. A preapplication conference with City staff shall be required. (See Section 18.32.040.)

C. Due to possible changes in state statutes, or regional or local policy, information given by staff to the applicant during the preapplication conference is valid for no more than six months:

1. Another preapplication conference is required if any variance application is submitted six months after the preapplication conference; and

2. Failure to the Director to provide any of the information required by this chapter shall not constitute a waiver of the standard, criteria or requirements of the applications.

D. The Director shall approve, approve with conditions, or deny any application for a variance. The Director shall apply the standards set forth in Section 18.134.050 when reviewing an application for a variance.

E. The decision of the Director may be appealed in accordance with Subsection 18.32.310.A.

F. The Director shall mail notice of any variance decision to persons who are entitled to notice in accordance with Section 18.32.130. (Ord. 89-06; Ord. 83-52)

* * *

18.134.050 Criteria for Granting a Variance

A. The Director shall approve, approve with conditions, or deny an application for a variance based on finding that the following criteria are satisfied:

1. The proposed variance will not be materially detrimental to the purposes of this title, be in conflict with the policies of the comprehensive plan, to any other applicable policies and standards, and to other properties in the same zoning district or vicinity;

2. There are special circumstances that exist which are peculiar to the lot size or shape, topography or other circumstances over which the applicant has no control, and which are not applicable to other properties in the same zoning district;

3. The use proposed will be the same as permitted under this title and City standards will be maintained to the greatest extent that is reasonably possible while permitting some economic use of the land;

4. Existing physical and natural systems, such as but not limited to traffic, drainage, dramatic land forms, or parks will not be adversely affected any more than would occur if the development were located as specified in the title; and

5. The hardship is not self-imposed and the variance requested is the minimum variance which would alleviate the hardship.

B. The Director shall approve, approve with modifications, or deny an application for an access

variance in accordance with the criteria set forth in Section 18.108.150.

C. The Director shall approve, approve with modifications, or deny an application for a subdivision variance subject to the criteria set forth in Section 18.160.120. (Ord. 89-06; Ord. 83-52)

* * *

Chapter 18.164

STREET AND UTILITY IMPROVEMENT STANDARDS

Sections:

18.164.010 Purpose

A. The purpose of this chapter is to provide construction standards for the implementation of public and private facilities and utilities such as streets, sewers, and drainage. (Ord. 89-06; Ord. 83-52)

18.164.020 General Provisions

A. Unless otherwise provided, the standard specifications for construction, reconstruction or repair of streets, sidewalks, curbs and other public improvements within the City shall occur in accordance with the standards of this title.

B. The City Engineer may recommend changes or supplements to the standard specifications consistent with the application of engineering principles.

C. No vehicles on a building construction site shall be allowed on unimproved surfaces.

D. The provision of Section 7.40 of the Tigard Municipal Code shall apply to this chapter. (Ord. 89-06; Ord. 83-52)

18.164.030 Streets

A. Improvements:

1. No development shall occur unless the development has frontage or approved access to a public street:

a. Streets within a development and streets adjacent shall be improved in accordance with this title;

b. Any new street or additional street width planned as a portion of an approved street plan shall be dedicated and improved in accordance with this code; and

c. The Director may accept a future improvement guarantee in lieu of the street improvements if one or more of the following conditions exists:

(i) A partial improvement is not feasible due to the inability to achieve property design standards;

(ii) A partial improvement may create a potential safety hazard to motorists or pedestrians;

(iii) Due to the nature of existing development on adjacent properties it is unlikely that street improvements would be extended in the foreseeable future and the improvement associated with the project under review does not, by itself, provide a significant improvement to street safety or capacity;

(iv) The improvement would be in conflict with an adopted capital improvement plan;

(v) The improvement is associated with an approved land partition on property zoned residential and the proposed land partition does not create any new streets; or

(vi) Additional planning work is required to define the appropriate

design standards for the street and the application is for a project which would contribute only a minor portion of the anticipated future traffic on the street.

B. Creation of Rights-of-way for Streets and Related Purposes:

1. Rights-of-way shall be created through the approval of a final subdivision plat or major partition; however, the Council may approve the creation of a street by acceptance of a deed, provided that such street is deemed essential by the Council for the purpose of general traffic circulation:

a. The Council may approve the creation of a street by deed of dedication without full compliance with the regulations applicable to subdivisions or major partitions if any one or more of the following conditions are found by the Council to be present:

(i) Establishment of a street is initiated by the Council and is found to be essential for the purpose of general traffic circulation, and partitioning of [sic] subdivision of land has an incidental effect rather than being the primary objective in establishing the road or street for public use; and

(ii) The tract in which the road or street is to be dedicated is an isolated ownership of one acre or less and such dedication is recommended by the Commission to the

Council based on a finding that the proposal is not an attempt to evade the provisions of this title governing the control of subdivisions or major partitions;

b. With each application for approval of a road or street right-of-way not in full compliance with the regulations applicable to the standards, the proposed dedication shall be made a condition of subdivision and major partition approval:

(i) The applicant shall submit such additional information and justification as may be necessary to enable the Commission in its review to determine whether or not a recommendation for approval by the Council shall be made;

(ii) The recommendation, if any, shall be based upon a finding that the proposal is not in conflict with the purpose of this title;

(iii) The Commission in submitting the proposal with a recommendation to the Council may attach conditions which are necessary to preserve the standards of this title; and

(iv) All deeds of dedication shall be in a form prescribed by the City and shall name "the City of Tigard,

Oregon" or "the public," whichever the City may require, as grantee.

* * *

D. Street Location, Width and Grade:

1. The location, width and grade of all streets shall conform to an approved street plan and shall be considered in their relation to existing and planned streets, to topographic conditions, to public convenience and safety, and in their appropriate relation to the proposed use of the land to be served by such streets:

   a. Street grades shall be approved by the public works Director [sic] in accordance with Subsection M below; and

   b. Where the location of a street is not shown in an approved street plan, the arrangement of streets in a development shall either:

      (i) Provide for the continuation or appropriate projection of existing streets in the surrounding areas, or

      (ii) Conform to a plan adopted by the Council, if it is impractical to conform to existing street patterns because of particular topographical or other existing conditions of the land. Such a plan shall be based on the type of land use to be served, the volume of traffic, the capacity of adjoining streets and the need for public convenience and safety.

E. Minimum Rights-of-Way and Street Widths:

1. Unless otherwise indicated on an approved street plan, the street right-of-way and roadway widths shall not be less than the minimum width described below (see Comprehensive Plan: Transportation). Where a range is indicated, the width shall be determined by the City.

   a. In Developing Areas:

Type of Street	Minimum Right-of-way Width (feet)	Minimum Roadway Width (feet)	Moving Lanes
Arterial	60-90	12'/lane	2-4
Major Collector	60-80	44'	2-4
Minor Collector	60	40'	2-3
Local Street	50	34'	2
Local Streets (planned developments only with equal off-street parking)	50	26'	2
Cul-de-sac dead-end streets, (not more than 400' long)	50	34'	2
Turn-arounds for dead-end streets	50' radius	42' radius	
Alley: Residential, Business or Industrial	20	20'	
	20	20'	

b. In established areas improvements to streets shall be made according to adopted City standards, unless the approval authority determines that the public benefit in a particular case does not warrant imposing an expected severe, adverse impact on the existing development. Any required variances to the standards shall be in the following priority order:

(i) Narrow or eliminate landscape strips;

(ii) Narrow or eliminate on-street parking;

(iii) Narrow or eliminate sidewalks and/or bike trails;

(iv) Eliminate left turn lanes; and

(v) Narrow travel lanes.

* * *

18.164.050 Easements

A. Easements:

1. Easements for sewers, drainage, water mains, electric lines or other public utilities shall be either dedicated or provided for in the deed restrictions, and:

a. Where a development is traversed by a watercourse, or drainageway, there shall be provided a storm water easement or

drainage right-of-way conforming substantially with the lines of the watercourse, and such further width management purposes.

B. Unility Easements:

1. A property owner proposing a development shall make arrangements with the City, the applicable district and each utility franchise for the provision and dedication of utility easements necessary to provide full services to the development:

a. The City's standard width for public main line utility easements shall be 15 feet unless otherwise specified by the utility company, applicable district, or City Engineer; and

b. Where feasible utility easements shall be all on one lot. (Ord. 89-06; Ord. 83-52)

* * *

18.164.070 Sidewalks

A. Sidewalks: Required

1. Except where exempted by the Commission, sidewalks shall be constructed, replaced or repaired to City design standards as set forth in the standard specifications manual and located as follows:

a. On both sides of arterial and collector streets to be built at the time of street construction;

b. On both sides of all other streets and in pedestrian easements and rights-of-way,

except as provided further in this section, to be constructed along all portions of the property designated for pedestrian ways in conjunction with development of the property; and

c. On one side of any industrial street to be constructed at the time of street construction or after determination of curb cut locations.

B. A planter strip separation of at least five feet between the curb and the sidewalk shall be required in the design of any arterial or collector street where parking is prohibited adjacent to the curb, except where the following conditions exist: there is inadequate right-of-way; the curbside sidewalks already exist on predominant portions of the street; or it would conflict with the utilities.

C. In the central business district sidewalks shall be 10 feet in width, and:

1. All sidewalks shall provide a continuous unobstructed path; and

2. The width of curbside sidewalks shall be measured from the back of the curb.

D. Maintenance:

1. Maintenance of sidewalks, curbs, and planter strips is the continuing obligation of the adjacent property owner.

E. Application for Permit and Inspection:

1. If the construction of a sidewalk is not included in a performance bond of an approved subdivision or the performance bond has lapsed, then every person, firm or corporation desiring to construct sidewalks as provided by this chapter, shall, before entering upon the work or improvement, apply for a street opening permit to the public works department to so build or construct:

a. An occupancy permit shall not be issued for a development until the provisions of this section are satisfied.

b. The City Engineer may issue a permit and certificate allowing temporary noncompliance with the provisions of this section to the owner, builder or contractor when, in his opinion, the construction of the sidewalk is impractical for one or more of the following reasons:

(i) Sidewalk grades have not and cannot be established for the property in question within a reasonable length of time;

(ii) Forthcoming installation of public utilities or street paving would be likely to cause severe damage to the new sidewalk;

(iii) Street right-of-way is insufficient to accommodate a sidewalk on one or both sides of the street; or

(iv) Topography or elevation of the sidewalk base area makes construction of a sidewalk impractical or economically infeasible; and

c. The City Engineer shall inspect the construction of sidewalks for compliance with the provision[s] set forth in the standard specifications manual.

F. Council Initiation of Construction:

1. In the event one or more of the following situations are found by the Council to exist, the Council may adopt a resolution to initiate construction of a sidewalk in accordance with City ordinances:

a. A safety hazard exists for children walking to or from school and sidewalks are necessary to eliminate the hazard;

b. A safety hazard exists for pedestrians walking to or from a public building, commercial area, place of assembly or other general pedestrian traffic, and sidewalks are necessary to eliminate the hazard;

c. 50 percent or more of the area in a given block has been improved by the construction of dwellings, multiple dwellings, commercial buildings or public buildings and/or parks; and

d. A criteria which allowed noncompliance under Section E.1.b above no longer exists and a sidewalk could be constructed in conformance with City standards. (Ord. 89-06; Ord. 83-52)

* * *

18.164.100 Storm Drainage

A. Storm Drainage: General Provisions:

1. The Director and City Engineer shall issue a development permit only where adequate provisions for storm water and flood water runoff have been made, and:

a. The storm water drainage system shall be separate and independent of any sanitary sewerage system;

b. Where possible, inlets shall be provided so surface water is not carried across any intersection or allowed to flood any street; and

c. Surface water drainage patterns shall be shown on every development proposal plan.

B. Easements:

1. Where a subdivision is traversed by a watercourse, drainageway, channel or stream, there shall be provided a storm water easement or drainage right-of-way conforming substantially with the lines of such watercourse and such further width as will be adequate fo conveyance and maintenance.

C. Accommodation of Upstream Drainage:

1. A culvert or other drainage facility shall, and in each case be, large enough to accommodate potential runoff from its entire upstream drainage area, whether inside or outside the development, and:

a. The City Engineer shall determine the necessary size of the facility, based on the provisions of the 1981 master drainage plan [sic].

D. Effect on Downstream Drainage:

1. Where it is anticipated by the City Engineer that the additional runoff resulting from the development will overload an existing drainage facility, the Director and Engineer shall withhold approval of the development until provisions have been made for improvement of the potential condition or until provisions have been made for storage of additional runoff caused by the development in accordance with the 1981 master drainage plan [sic]. (Ord. 89-06; Ord. 83-52)

18.164.110 Bikeways

A. Developments adjoining proposed bikeways identified on the adopted pedestrian/bikeway plan shall include provisions for the future extension of such bikeways through the dedication of easements or rights-of-way.

B. Development permits issued for planned unit developments, conditional use permits, and other developments which will principally benefit from such bikeways shall be conditioned to include the cost of bikeway improvements.

C. Where possible, bikeways should be separated from other modes of travel including pedestrians.

D. Minimum width for bikeways is six feet per travel lane. (Ord. 89-06; Ord. 83-52)

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* * *

APPENDIX C

EXCERPTS FROM THE OREGON REVISED STATUTES (ORS)

197.825 Jurisdiction of board; limitations; effect on circuit court jurisdiction. (1) Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the board shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.

(2) The jurisdiction of the board:

(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review;

(b) Is subject to the provisions of ORS 197.850 relating to judicial review by the Court of Appeals;

(c) Does not include those matters over which the department has review authority under ORS 197.430 to 197.455, 197.649 and 197.650;

(d) Does not include those land use decisions of a state agency over which the Court of Appeals has jurisdiction for initial judicial review under ORS 183.400, 183.482 or other statutory provisions;

(e) Does not include any rules, programs, decisions, determinations or activities carried out under ORS 527.610 to 527.770, 527.990 (1) and 527.992; and

(f) Is subject to ORS 196.115 for any county land use decision that may be reviewed by the Columbia River Gorge Commission pursuant to sections 10(c) or 15(a)(2)

of the Columbia River Gorge National Scenic Area Act, P.L. 99-663.

(3) Notwithstanding subsection (1) of this section, the circuit courts of this state retain jurisdiction:

(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015 (10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations; and

(b) To enforce orders of the board in appropriate proceedings brought by the board or a party to the board proceeding resulting in the order. [1983 c.827 §30; 1987 c.729 §14; 1987 c.856 §9; 1987 c.919 §4; 1989 c.761 §11; 1991 c.817 §4]

* * *

197.829 Board to affirm certain local government interpretations. The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

(1) Is inconsistent with the express language of the comprehensive plan or land use regulation;

(2) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

(3) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

(4) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements. [1993 c.792 §43]

197.830 Review procedures; standing; deadlines; issues subject to review; attorney fees and costs; publication of orders; mediation. (1) Review of land use decisions or limited land use decisions under ORS 197.830 to 197.845 shall be commenced by filing a notice of intent to appeal with the Land Use Board of Appeals.

(2) Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:

(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and

(b) Appeared before the local government, special district or state agency orally or in writing.

(3) If a local government makes a land use decision without providing a hearing or the local government makes a land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

(a) Within 21 days of actual notice where notice is required; or

(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.

(4) If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

(a) Within 21 days of actual notice where notice is required; or

(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.

(5)(a) Except as provided in paragraph (b) of this subsection, the appeal period described in subsection (3) of this section shall not exceed three years after the date of the decision.

(b) If notice of a hearing or an administrative decision made pursuant to ORS 197.763, 197.195, 215.416 (11) or ORS 227.175 (10) is required but has not been provided, the provisions of paragraph (a) of this subsection do not apply.

(6)(a) Within a reasonable time after a petition for review has been filed with the board, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) of this section.

(b) Notwithstanding the provisions of paragraph (a) of this subsection, persons who may intervene in and be

made a party to the review proceedings, as set forth in subsection (1) of this section, are:

(A) The applicant who initiated the action before the local government, special district or state agency; or

(B) Persons who appeared before the local government, special district or state agency, orally or in writing.

(7) If a state agency whose order, rule, ruling, policy or other action is at issue is not a party to the proceeding, it may file a brief with the board as if it were a party. The brief shall be due on the same date the respondent's brief is due.

(8) A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615. Copies of the notice of intent to appeal shall be served upon the local government, special district or state agency and the applicant of record, if any, in the local government, special district or state agency proceeding. The notice shall be served and filed in the form and manner prescribed by rule of the board and shall be accompanied by a filing fee of $50 and a deposit for costs to be established by the board. If a petition for review is not filed with the board as required in subsections (9) and (10) of this section, the filing fee and deposit shall be awarded to the local government, special district or state agency as cost of preparation of the record.

(9)(a) Within 21 days after service of the notice of intent to appeal, the local government, special district or state agency shall transmit to the board the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceeding the record may be shortened. The board may require or permit subsequent corrections to the record.

(b) Within 10 days after service of a notice of intent to appeal, the board shall provide notice to the petitioner and the respondent of their option to enter into mediation pursuant to ORS 197.860. Any person moving to intervene shall be provided such notice within seven days after a motion to intervene is filed. The notice required by this paragraph shall be accompanied by a statement that mediation information or assistance may be obtained from the Department of Land Conservation and Development, the coordinating agency for the Natural Resources Section of the Public Policy Dispute Resolution Program.

(10) A petition for review of the land use decision or limited land use decision and supporting brief shall be filed with the board as required by the board under subsection (12) of this section. Issues shall be limited to those raised by any participant before the local hearings body as provided in ORS 197.763. A petitioner may raise new issues to the board if:

(a) The local government failed to follow the requirements of ORS 197.763; or

(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the

notice of the proposed action did not reasonably describe the local government's final action.

(11) The petition shall include a copy of the decision sought to be reviewed and shall state:

(a) The facts that establish that the petitioner has standing.

(b) The date of the decision.

(c) The issues the petitioner seeks to have reviewed.

(12)(a) The board shall adopt rules establishing deadlines for filing petitions and briefs and for oral argument.

(b) At any time subsequent to the filing of a notice of intent and prior to the date set for filing the record, the local government or state agency may withdraw its decision for purposes of reconsideration. If a local government or state agency withdraws an order for purposes of reconsideration, it shall, within such time as the board may allow, affirm, modify or reverse its decision. If the petitioner is dissatisfied with the local government or agency action after withdrawal for purposes of reconsideration, the petitioner may refile the notice of intent and the review shall proceed upon the revised order. An amended notice of intent shall not be required if the local government or state agency, on reconsideration, affirms the order or modifies the order with only minor changes.

(13)(a) Review of a decision under ORS 197.830 to 197.845 shall be confined to the record.

(b) In the case of disputed allegations of unconstitutionality of the decision, standing, ex parte contacts or

other procedural irregularities not shown in the record which, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record.

(14) The board shall issue a final order within 77 days after the date of transmittal of the record. If the order is not issued within 77 days the applicant may apply in Marion County or the circuit court of the county where the application was filed for a writ of mandamus to compel the board to issue a final order.

(15)(a) Upon entry of its final order the board may, in its discretion, award costs to the prevailing party including the cost of preparation of the record if the prevailing party is the local government, special district or state agency whose decision is under review. The deposit required by subsection (8) of this section shall be applied to any costs charged against the petitioner.

(b) The board may also award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded, and primarily for a purpose other than to secure appropriate action by the board.

(16) Orders issued under this section may be enforced in appropriate judicial proceedings.

(17)(a) The board shall provide for the publication of its orders that are of general public interest in the form

it deems best adapted for public convenience. The publications shall constitute the official reports of the board.

(b) Any moneys collected or received from sales by the board shall be paid into the Board Publications Account established by ORS 197.832.

(18) Except for any sums collected for publication of board opinions, all fees collected by the board under this section that are not awarded as costs shall be paid over to the State Treasurer to be credited to the General Fund. [1983 c.827 §31; 1985 c.119 §3; 1987 c.278 §1; 1987 c.729 §16; 1989 c.761 §12; 1991 c.817 §7; 1993 c.143 §1; 1993 c.310 §1]

* * *

APPENDIX D

* * *

EXCERPTS FROM THE OREGON ADMINISTRATIVE RULES

GOAL 7: AREAS SUBJECT TO NATURAL DISASTERS AND HAZARDS

OAR 660-15-000(7)

To protect life and property from natural disasters and hazards.

Developments subject to damage or that could result in loss of life shall not be planned nor located in known areas of natural disasters and hazards without appropriate safeguards. Plans shall be based on an inventory of known areas of natural disaster[s] and hazards.

Areas of Natural Disasters and Hazards – are areas that are subject to natural events that are known to result in death or endanger the works of man, such as stream flooding, ocean flooding, ground water, erosion and deposition, landslides, earthquakes, weak foundation soils and other hazards unique to local or regional areas.

* * *

GOAL 11: PUBLIC FACILITIES AND SERVICES

OAR 660-15-000(11)

To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.

Urban and rural development shall be guided and supported by types and levels of urban and rural public facilities and services appropriate for, but limited to, the

needs and requirements of the urban, urbanizable, and rural areas to be served. A provision for key facilities shall be included in each plan. Cities or counties shall develop and adopt a public facility plan for areas within an urban growth boundary containing a population greater than 2,500 persons. To meet current and long-range needs, a provision for solid waste disposal sites, including sites for inert waste, shall be included in each plan.

In accordance with ORS 197.180 and Goal 2, state agencies that provide funding for transportation, water supply, sewage and solid waste facilities shall identify in their coordination programs how they will coordinate that funding with other state agencies and with the public facility plans of cities and counties.

A Timely, Orderly and Efficient Arrangement – refers to a system or plan that coordinates the type, locations and delivery of public facilities and services in a manner that best supports the existing and proposed land uses.

Rural Facilities and Services – refers to facilities and services which the governing body determines to be suitable and appropriate solely for the needs of rural use.

Urban Facilities and Services – refers to key facilities and to appropriate types and levels of at least the following: police protection; sanitary facilities; storm drainage facilities; planning, zoning and subdivision control; health services; recreation facilities and services; energy and communication services; and community governmental services.

Public Facilities Plan – A public facility plan is a support document or documents to a comprehensive plan. The facility plan describes the water, sewer and transportation facilities which are to support the land uses designated in the appropriate acknowledged comprehensive plan or plans within an urban growth boundary containing a population greater than 2,500.

GOAL 12: TRANSPORTATION

OAR 660-15-000(12)

To provide and encourage a safe, convenient and economic transportation system.

A transportation plan shall (1) consider all modes of transportation including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian; (2) be based upon an inventory of local, regional and state transportation needs; (3) consider the differences in social consequences that would result from utilizing differing combinations of transportation modes; (4) avoid principal reliance upon any one mode of transportation; (5) minimize adverse social, economic and environmental impacts and costs; (6) conserve energy; (7) meet the needs of the transportation disadvantaged by improving transportation services; (8) facilitate the flow of goods and services so as to strengthen the local and regional economy; and (9) conform with local and regional comprehensive land use plans. Each plan shall include a provision for transportation as a key facility.

Transportation – refers to the movement of people and goods.

Transportation Facility – refers to any physical facility that moves or assists in the movement of people and goods excluding electricity, sewage and water.

Transportation System – refers to one or more transportation facilities that are planned, developed, operated and maintained in a coordinated manner to supply continuity of movement between modes, and within and between geographic and jurisdictional areas.

Mass Transit – refers to any form of passenger transportation which carries members of the public on a regular and continuing basis.

Transportation Disadvantaged – refers to those individuals who have difficulty in obtaining transportation because of their age, income, physical or mental disability.

* * *

DEFINITIONS

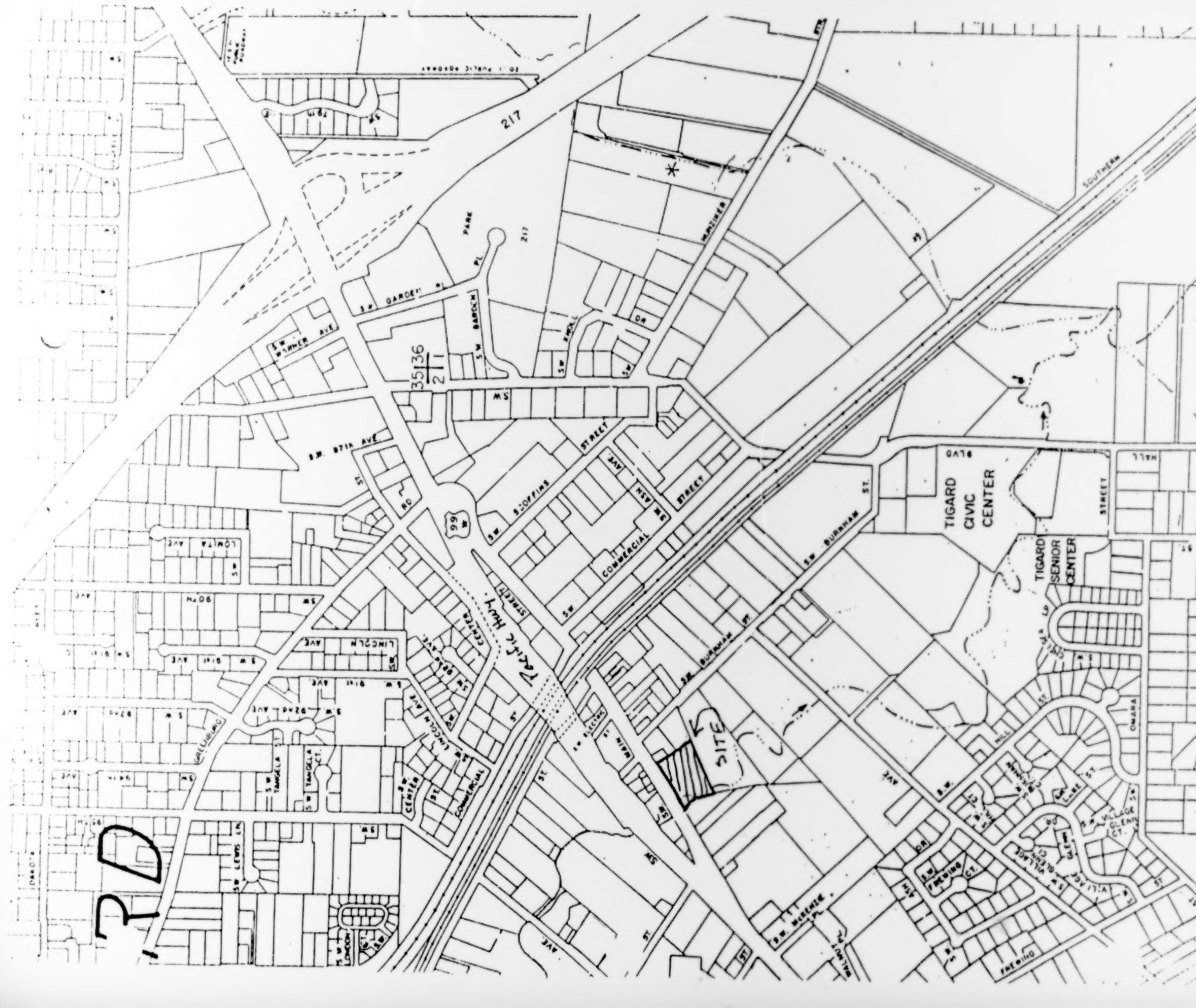
OAR 660-15-000

KEY FACILITIES. Basic facilities that are primarily planned for by local government but which also may be provided by private enterprise and are essential to the support of more intensive development, including public schools, transportation, water supply, sewage and solid waste disposal.

APPENDIX E

EXCERPTS FROM THE OREGON SUPREME COURT RECORD

* * *



LUBA FILING - CITY OF TIGARD
EXHIBIT # G
PAGE # 5

R-Doc. No. B, Pages 151-156, 158-160

KNAPPENBERGER & MENDEZ

ATTORNEYS AT LAW

HONEYMAN HOUSE
1318 S.W. 12TH AVE.
PORTLAND, OREGON 97201-3367
(503) 294-0442

JOSEPH R. MENDEZ
ALLAN F. KNAPPENBERGER

PETER MILLER
OF COUNSEL

FAX
(503) 294-4317

March 28, 1991

Jerry Offer
13125 S.W. Hall Blvd.
Planning Dept.
P.O. Box 23397
Tigard, Oregon 97223

Re: John and Florence Dolan
Site Development Review Application

Dear Mr. Offer:

Please find enclosed Applicant's Statement of Justification for Variance, Construction Cost Estimate and 15 copies of the site plans.

If you have any questions or concerns regarding the above, please feel free to contact me. Thank you for your cooperation and consideration in this matter.

Very truly yours,

KNAPPENBERGER & MENDEZ

/s/ Joseph R. Mendez
Joseph R. Mendez

JRM:sp
Enc.

STATEMENT OF JUSTIFICATION FOR VARIANCE

The variance requested by the applicant should be allowed as the conditions and dedications required by the City of Tigard violate the applicant's rights under the Oregon and United States Constitutions. Specifically, the City's demand for dedication constitute[s] an unlawful taking and violation of the Oregon Constitution, Article 1, Section 18 and the Fifth Amendment to the United States Constitution.

The proposed variance will not materially be detrimental to the purposes of the title nor conflict with the policy of the comprehensive plan as no park exists at this time nor does the City have sufficient funding in which to create a park that the bicycle/pedestrian path is theoretically going to be used to access.

There are special circumstances that exist which are peculiar to the lot in that the building which the applicant proposes to construct cannot be erected without invading the City's proposed bicycle/pedestrian path if the land is dedicated.

This hardship is not self-imposed but rather imposed by the City's dedication and the variance requested is the minimum variance which would alleviate the hardship to the applicant.

DATED this 26 day of March, 1991.

KNAPPENBERGER & MENDEZ

By: /s/ Joseph R. Mendez
JOSEPH R. MENDEZ,
OSB #82333
Attorney for Applicant

CONSTRUCTION COST ESTIMATE

Applicant states the construction cost estimate for the building on the site is $352,000.00. Said construction cost estimate is based upon a cost of $20.00 per square foot for the 17,600 square foot building to be constructed on the site.

KNAPPENBERGER & MENDEZ

By: /s/ Joseph R. Mendez
JOSEPH R. MENDEZ,
OSB #82333
Attorney for Applicant

* * *

PROPOSAL DESCRIPTION

FILE NO:SDR 91-0005/VAR 91-0010

FILE TITLE: Dolan/Mendez

APPLICANT: Knappenberger & Mendez
Attn: Joseph R. Mendez
1318 SW 12th Avenue
Portland, OR 97201

OWNER: John T. Dolan
Florence Dolan
1919 NW 19th Ave.
Portland, OR 97209

REQUEST, ZONE, LOCATION: Applicant requests Site Development Review approval to allow construction of an approximately 17,600 square foot retail sales building. Applicant also requests Variance approval to allow: 1) retention of area within the 100 year floodplain, and area adjacent to the floodplain for bike path construction

whereas the Community Development Code requires dedication of this area to the City; 2) retention of an existing roof sign on adjacent building whereas the Code requires removal of all roof signs. ZONE: CBD (Central Business District)

LOCATION: 12520 SW Main Street

(WCTM 2S1 2AC, tax lot 700)

COMPREHENSIVE PLAN DESIGNATION:
Central Business District

NPO NO: 1
NPO CHAIRPERSON: Ed Duffield
PHONE NUMBER: 620-8494

CHECK ALL WHICH APPLY:

		COMMENTS DUE BACK TO STAFF ON
X	STAFF DECISION	4/25/ 1991
_	PLANNING COMMISSION	DATE OF HEARING: _____ TIME: 7:30
_	HEARINGS OFFICER	DATE OF HEARING: _____ TIME: 7:00
_	CITY COUNCIL	DATE OF HEARING: _____ TIME: 7:30

REQUEST FOR COMMENTS AND ATTACHMENTS:

X	VICINITY MAP	X	LANDSCAPING PLAN
X	NARRATIVE	_	ARCHITECTURAL PLAN
X	SITE PLAN	_	OTHER:

PREPARE FOR PLANNER APPROVAL:

X ADVERTISEMENT - TIGARD TIMES ___
OREGONIAN _____

X NOTICE TO PROPERTY OWNERS TO BE MAILED _
_ LETTER OF ACCEPTANCE OF APPLICATION ___
_ NOTICE TO DLCD - ATTACHMENTS: _____
STAFF CONTACT: Ron Pomeroy

* * *

[LOGO]

CITY OF TIGARD, OREGON

SITE DEVELOPMENT REVIEW APPLICATION

CITY OF TIGARD, 13125 SW Hall, PO Box 23397
Tigard, Oregon 97223 - (503) 639-4171

1. GENERAL INFORMATION

PROPERTY ADDRESS/LOCATION 12520 S.W. Main Street, Tigard, Oregon

MAP AND TAX LOT NO. 2S1 ZAC, TAX LOT 700

SITE SIZE 1.67

PROPERTY OWNER/DEED HOLDER* John T. Dolan
Florence Dolan

ADDRESS 1919 N.W. 19th Ave. PHONE 225-9009

CITY Portland, Oregon ZIP 97209

APPLICANT* Attorney: Joseph R. Mendez

ADDRESS 1318 S.W. 12th Ave. PHONE 294-0442

CITY Portland, Oregon ZIP 97201

_____

* When the owner and the applicant are different people, the applicant must be the purchaser of record or a leasee in possession with written authorization from the owner or an agent of the owner with written authorization. The owner(s) must sign this application in the space provided on page two or submit a written authorization with this application.

2. PROPOSAL SUMMARY
The owners of record of the subject property request site development review approval to allow The construction of a 17,600 square foot building having a general retail sales facility

FOR STAFF USE ONLY

CASE NO. SDR 91-05

OTHER CASE NO'S: VAR 91-10

RECEIPT NO. 91-211 729

APPLICATION ACCEPTED BY: RP

DATE: 3-28-91

Application elements submitted:

X (A) Application form (1)
X (B) Owner's signature/written authorization
X (C) Title transfer instrument (1)
X (D) Assessor's map (1)
X (E) Plot plan (pre-app checklist)
X (F) Applicant's statement (pre-app checklist)
X (G) ~~List of property owners and addresses within 250 feet (1)~~
X (H) Filing fee ($315+8=$323)
X (I) Construction Cost Estimate

DATE DETERMINED TO BE COMPLETE:
4-5-91

FINAL DECISION DEADLINE: _____

COMP. PLAN/ZONE DESIGNATION:

CBD (PD) CENTRAL BUSINESS DIST.

N.P.O. Number: 1

Approval Date:

_____

Final Approval Date:

Planning _____

* * *

List any variance, conditional use, sensitive lands, or other land use actions to be considered as part of this application: See Attachment A.

Applicants: To have a complete application you will need to submit attachments described in the attached information sheet at the time you submit this application.

THE APPLICANT(S) SHALL CERTIFY THAT:

A. The above request does not violate any deed restrictions that may be attached to or imposed upon the subject property.

B. If the application is granted, the applicant will exercise the rights granted in accordance with the terms and subject to all the conditions and limitations of the approval.

C. All of the above statements and the statements in the plot plan, attachments, and exhibits transmitted herewith, are true; and the applicants so acknowledge that any permit issued, based on this application, may be revoked if it is found that any such statements are false.

The applicant has read the entire contents of the application, including the policies and criteria, and understands the requirements for approving or denying the application.

DATED this 18th day of March 1991

SIGNATURES of each owner (eg. husband and wife) of the subject property.

X /s/ John Dolan
JOHN DOLAN

_____

X /s/ Florence Dolan
FLORENCE DOLAN

_____

* * *

KNAPPENBERGER & MENDEZ
ATTORNEYS AT LAW
HONEYMAN HOUSE
1318 S.W. 12TH AVE.
PORTLAND, OREGON 97201-3367
(503) 294-0442

JOSEPH R. MENDEZ
ALLAN F. KNAPPENBERGER
PETER MILLER
OF COUNSEL

FAX
(503) 294-4317

March 12, 1991

Jerry Offer
13125 S.W. Hall Blvd.
Planning Dept.
P.O. Box 23397
Tigard, Oregon 97223

Re: John and Florence Dolan
Site Development Review Application

Dear Mr. Offer:

Please find enclosed herewith the Site Development Review Application, Applicant's Statement and Attachment A.

In the event there is any problem with either the variance documents, attachments or time limitations, please notify my office immediately.

Thank you for your cooperation and consideration in this matter.

Very truly yours,

KNAPPENBERGER & MENDEZ

/s/ Joseph R. Mendez
Joseph R. Mendez

JRM:sp
Enc.

cc: John Dolan

* * *

APPLICANT'S STATEMENT

The applicant is requesting variances with regard to the dedications required which comprise approximately 7,000 square feet or ten percent (10%) of the subject parcel. Variances regarding the dedication of all portions of the property below the elevation of 150 feet that fall within the existing 100 year floodplain and all property fifteen (15) feet above, to the east of 150 foot floodplain boundary which is intended to be used as a pedestrian/bike path. In addition, the City has inappropriately characterized an existing sign as a roof sign. The applicant requests that the wall sign not be required to be removed within the forty-five day period set forth in the Notice of Final Order by City Council which became final on February 5, 1990.

DATED this 18th day of March, 1991.

X /s/ John Dolan
JOHN DOLAN

X /s/ Florence Dolan
FLORENCE DOLAN

* * *

ATTACHMENT A

The property owner/deed holder is requesting approval of the variances listed below as consistent with section 18.134 *et seq.* of the code as follows:

1. Variance from the condition requiring dedication to the City as greenway all portions of the cite [sic] that fall within the existing 100 year floodplain (i.e. all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot flood plain boundary.

2. Variance from the condition requiring dedication of that portion of Petitioner's property for the purposes of a bike path.

3. Variance and the requirement that the "roof sign" that the owner/deed holder maintains is not a "roof sign" and should be accurately characterized as a "wall sign" be removed within 45 days of occupancy of the new building.